88-1046

No. .....

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1988

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RAYMOND J. TORRES, FRANKLIN J. UTZ, and GERALD F. SCHMIT,

Petitioners,

v.

WISCONSIN DEPARTMENT OF HEALTH AND SOCIAL SERVICES, TAYCHEEDAH CORRECTIONAL INSTITUTION, NONA J. SWITALA, and CERTAIN UNNAMED DEFENDANT EMPLOYEES OF THE WISCONSIN DEPARTMENT OF HEALTH AND SOCIAL SERVICES,

Respondents.

—o—

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

—o—

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QUESTIONS PRESENTED

1. Whether overt sex discrimination against male correctional officers in a female prison is a bona fide occupational qualification ("BFOQ") for reasons that are unrelated to inmates' privacy, to the security of the prison, or to the security of the employee.

2. Whether the heavy burden of establishing a BFOQ defense imposed on an employer seeking to come within the BFOQ exception to Title VII should be relaxed in cases involving BFOQ plans created and implemented by prison administrators to such an extent that the prison administrator's decision to discriminate per a BFOQ is entitled to deference.

3. Whether the Seventh Circuit *en banc* erred in ruling that substantial weight should be given to the opinion of a prison superintendent that rehabilitation of female inmates will be improved if only female correctional officers are permitted in the inmates' housing units in determining whether the prison superintendent established a BFOQ defense.

4. Whether overt sex discrimination, otherwise forbidden by Title VII, in prison employment is among the "certain instances" allowed per the BFOQ exception based on a theory that the rehabilitation of female inmates is fostered by not allowing male correctional officers in housing units because sixty percent of the female inmates were at one time physically and sexually abused by males.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
STATUTE INVOLVED	2
STATEMENT OF THE CASE:	
A. Facts And Background	3
B. Decisions Below	6
REASONS FOR GRANTING THE PETITION:	
I. WHAT THIS CASE IS ABOUT	9
II. THE PETITION SHOULD BE GRANTED BECAUSE IN REQUIRING DEFERENCE TO A PRISON ADMINISTRATOR'S DECISION TO DISCRIMINATE UNDER A BFOQ PLAN THE *EN BANC* OPINION DIRECTLY AND IRRECONCILABLY CONFLICTS WITH DECISIONS OF THE SUPREME COURT AND OF VARIOUS CIRCUITS	10
III. THE PETITION SHOULD BE GRANTED BECAUSE DEFERENCE TO PRISON ADMINISTRATOR DECISIONS IS INAPPROPRIATE WHEN SEX DISCRIMINATION IN THE EMPLOYMENT OF CORRECTIONAL OFFICERS IS CHALLENGED	16
IV. THE *EN BANC* OPINION PERMITS SEX DISCRIMINATION PER A BFOQ WITHOUT AN ADEQUATE BASIS	17
V. REHABILITATION CANNOT SERVE AS THE JUSTIFICATION FOR A BFOQ PLAN INSTITUTED AT A FEMALE PRISON BY THE PRISON ADMINISTRATOR	21

TABLE OF CONTENTS—Continued

Page

A. Rehabilitation Is A Subordinate Goal In The Field Of Corrections And Cannot Serve As The Basis For A BFOQ. 21

B. The *En Banc* Opinion Subordinates A Statutory Command Against Gender Discrimination To An Abstract Interest In Rehabilitaion And Hence Burdens The Petitioners' Statutory, If Not Constitutional, Right To Equal Employment 21

C. A Rehabilitation Theory Based On A Stereotypical Characterization Of The Sexes Cannot Be Used To Justify A BFOQ 24

VI. THE *EN BANC* OPINION IS IN ERROR AND MUST BE REVERSED 25

VII. THIS CASE IS NOW RIPE FOR REVIEW.. 26

CONCLUSION 27

APPENDIX 1a

TABLE OF AUTHORITIES

CASES: Page

Chambers v. Omaha Girls Club, 834 F.2d 697 (8th Cir. 1987) 19

City of Los Angeles, Dept. of Water v. Manhart, 98 S.Ct. 1370 (1978) 24

Craig v. Boren, 97 S.Ct. 451 (1976) 18

Diaz v. Pan Am World Airways, Inc., 442 F.2d 385 (5th Cir. 1971) 16, 21

Dothard v. Rawlinson, 97 S.Ct. 2720 (1977) 10, 11, 12, 13, 14, 16, 18, 20, 21, 23, 24

Edwards v. Department of Corrections, 615 F. Supp. 804 (M.D. Ala. 1985) 14

Fesel v. Masonic Home of Del., Inc., 447 F. Supp. 1346 (Del. 1978), *aff'd* 591 F.2d 1334 (3rd Cir. 1979) 12

Forts v. Ward, 471 F. Supp. 1095 (S.D. N.Y. 1979), *rev'd in part on other grounds*, 621 F.2d 1210 (2nd Cir. 1980) 14

Forts v. Ward, 621 F.2d 1210 (2nd Cir. 1980) 14

French v. Heyne, 547 F.2d 994 (7th Cir. 1976) 21

Griffen v. Michigan Dept. of Corrections, 654 F. Supp. 690 (E.D. Mich. 1982) 12, 25

Gunther v. Iowa State Men's Reformatory, 462 F. Supp. 952 (N.D. Iowa 1979), *aff'd* 612 F.2d 1079 (8th Cir. 1980) 25

Gunther v. Iowa State Men's Reformatory, 612 F.2d 1079 (8th Cir. 1980), *cert. den.* 100 S.Ct. 2942 (1980) 14

Harden v. Dayton Human Rehabilitation Center, 520 F. Supp. 769 (S.D. Ohio 1981), *aff'd* 779 F.2d 50 (6th Cir. 1985) 11, 14

TABLE OF AUTHORITIES—Continued

Page

Hardin v. Stynchcomb, 691 F.2d 1364 (11th Cir. 1982) 14

Jones v. North Carolina Prisoners' Union, 97 S.Ct. 2532 (1977) 12

Manley v. Mobile County, Ala., 441 F. Supp. 1351 (S.D. Ala. 1977) 12

Mississippi University for Women v. Hogan, 102 S.Ct. 3331 (1982) 24

Pell v. Procunier, 94 S.Ct. 2800 (1974) 21

Pime v. Loyola University of Chicago, 803 F.2d 351 (7th Cir. 1986) 19

Procunier v. Martinez, 94 S.Ct. 1800 (1974) 12, 17

Reynolds v. New York Dept. of Corr. Serv., 568 F. Supp. 747 (S.D. N.Y. 1983) 14

Torres v. Wis. Dept. Of Health & Social Services, 639 F. Supp. 271 (E.D. Wis. 1986) ..... *passim*

Torres v. Wis. Dept. Of Health & Social Services, 838 F.2d 944 (7th Cir. 1988) ..... *passim*

Torres v. Wis. Dept. Of Health & Social Services, Appeal No. 86-2161 (7th Cir. 1988) (*en banc* slip opinion) ..... *passim*

Turner v. Safley, 107 S.Ct. 2254 (1987) 17, 22

Wards Cove Packing Company, Inc. v. Antonio, Case No. 87-1387, review granted, to be argued January 18, 1989 10

Watson v. Fort Worth Bank and Trust, 108 S.Ct. 2777 (1988) 19, 20

Weeks v. Southern Bell Telephone and Telegraph Co., 408 F.2d 228 (5th Cir. 1969) 11

Western Air Lines v. Criswell, 105 S.Ct. 2743 (1985) 13, 18, 20

TABLE OF AUTHORITIES—Continued

Page

CONSTITUTIONAL AND STATUTORY PROVISIONS:

Fourteenth Amendment, United States Constitution 23

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1331 1

42 U.S.C. § 2000e-2 2

42 U.S.C. § 2000e-2(e) 2, 10

Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. 2000e *et seq* ..... *passim*

29 C.F.R. § 1604.2(a) 11

29 C.F.R. § 1604.2(a)(1)(ii) 11

H.R. Rep. No. 914, 88 Cong. 1st Session (1963) 11

110 Cong. Rec. 7213 (1964) 11

70 Opinion of Attorney General (Wisconsin) (O.A.G.) 202 (1981) 14

OPINIONS BELOW

The *en banc* Opinion of the Court of Appeals for the Seventh Circuit is reprinted in the appendix hereto, p. 1a, *infra*.

The panel Opinion of the Court of Appeals for the Seventh Circuit is reported at 838 F. 2d 944, and is reprinted in the appendix hereto, p. 37a, *infra*.

The Decision and Order of the United States District Court, Eastern District of Wisconsin, the Honorable Robert W. Warren presiding, is reported at 639 F. Supp. 271, and is reprinted in the appendix hereto, p. 68a, *infra*.

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JURISDICTION

The jurisdiction of the United States District Court, Eastern District of Wisconsin, was invoked under Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e *et seq.*, and under 28 U.S.C. § 1331. On May 16, 1986, after an eleven-day court trial, judgment was rendered for the Petitioners as contained in the District Court's Decision and Order. See p. 68a, *infra*.

On January 29, 1988, the Court of Appeals for the Seventh Circuit entered its panel Opinion and Judgment affirming the judgment of the District Court. See p. 37a, *infra*.

On October 17, 1988, the Court of Appeals for the Seventh Circuit entered its *en banc* Opinion and Judg-

ment reversing the judgment of the District Court. See p. 1a, *infra*. No petition for rehearing was filed.

The jurisdiction of this Court to review the judgment of the United States Court of Appeals for the Seventh Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The principal statutory provisions involved in this matter are the general prohibition against sex discrimination in employment and the bona fide occupational qualification ("BFOQ") exception thereto found in Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972 ("Title VII"), 42 U.S.C. 2000e-2 and 42 U.S.C. 2000e-2(e), which provide in relevant part respectively:

> "It shall be an unlawful employment practice for an employer—
>
> (1) to . . . discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . ." 42 U.S.C. 2000e-2.
>
> "Notwithstanding any other provision of this subchapter . . . it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis . . . of sex . . . in those certain instances where . . . sex . . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . ." 42 U.S.C. 2000e-2(e).

STATEMENT OF THE CASE

A. Facts and Background.

This case involves a challenge to a BFOQ Plan created and implemented at the Taycheedah Correctional Institution ("TCI"), which is the only maximum security women's prison in the State of Wisconsin. (Appendix ("A"), p. 1a). It currently houses only female inmates of all three security classifications: maximum, medium, and minimum. (A, p. 72a). TCI began operating as a female prison in 1921, and in its present form in 1945. (Transcript ("TR"), Vol. 9, pp. 10-11).

In July of 1975, TCI was made co-correctional, with male inmates and male correctional personnel being transferred thereto. (A, p. 40a). Prior to that time, TCI's housing units had been staffed solely by female correctional officers, although male maintenance personnel were called upon on occasion to handle disturbances.[1] (TR, Vol. 5, pp. 134-136). TCI maintained its co-correctional status until February, 1978, at which time the male inmates were transferred out; however, the male correctional officers remained. (A, p. 40a).

The Petitioners, Raymond J. Torres, Franklin J. Utz, and Gerald F. Schmit transferred to TCI in 1978, 1979 and 1975, respectively, as Correctional Officer IIIs ("sergeants"), and worked as sergeants in the housing units. (A, p. 71a). Each of the Petitioners has always performed his duties in a very professional manner. (TR, Vol. 8, p. 159).

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[1]The inmate housing units were, however, staffed from their inception and until 1975 solely by female correctional officers.

In August, 1978, the Wisconsin Department of Health and Social Services ("DHSS"), through its Division of Corrections, authorized all correctional institution superintendents to submit requests for gender—based BFOQ posts. (A, p. 43a). The superintendents were informed that the BFOQ requests were to be made for the purpose of insuring inmate privacy and would be accepted and considered for three areas only, assuming no administrative alternatives existed: (1) bathroom/shower officer, where an essential and substantial percentage of activities performed in that position involved management and supervision of bathroom and shower facilities; (2) living unit officer, where a single post was assigned to a living unit; and (3) segregation/adjustment unit officer, where an essential and substantial percentage of the activities performed in said position involved the performance of strip searches. (Stipulated Exhibits ("Stip. Ex.") 441, 447).

In June, 1980, at the request of TCI Superintendent Nona Switala ("Switala"), DHSS approved a BFOQ Plan for TCI authorizing the BFOQ'ing of 19 of 27 posts in the inmate housing units, including all of the sergeant posts therein. (A, p. 43a). However, no other institution in Wisconsin which requested BFOQ posts were awarded them. (A, p. 44a).

The TCI BFOQ Plan was to be initially implemented on September 1, 1980, with full implementation to occur by September 1, 1982. (A, pp. 43a-44a). The full implementation of the BFOQ Plan was to be accomplished by a gradual process of attrition whereby BFOQ posts under the Plan would, as vacancies occurred, be filled only by female

personnel. (A, p. 79a). Further, male correctional officers occupying BFOQ posts as of September 1, 1982, would be required to vacate those posts, which would then be filled by female correctional officers. (A, pp. 43a-44a). At the time of trial, all correctional officer I, II, and sergeant posts in the housing units were BFOQ, with the exception of two rover positions on the first and second shifts. (A, p. 80a). The two rover positions were available to males, and involved "roving" through the female inmates' housing units on a given shift. (TR, Vol. 1, pp. 135-136). Additionally, there were other non-housing units non-BFOQ posts held by male correctional officers which involved contact between them and the female inmates.

In July of 1982, the Petitioners were each individually notified that they were going to be laid off effective September 4, 1982, because TCI exceeded its allotment of male sergeants by three male staff according to the allotment of BFOQ posts. (Stip. Exs. 2, 35, 62). In order to avoid layoff, each Petitioner involuntarily demoted to the classification of correctional officer II and was transferred out of the housing units. The positions vacated by the Petitioners were subsequently filled by female sergeants with less seniority and experience than the Petitioners. (A, p. 44a). Although the Petitioners' wage rate was not reduced, there was a marked contraction in the number of posts that they could work. (A, p. 81a).

Each of the Petitioners, at different times, filed charges of discrimination with the Equal Employment Opportunity Commission ("EEOC"). After conducting an extensive investigation of the charges, the EEOC issued its determinations with respect to each, finding that there

was reasonable cause to believe that the Petitioners had been discriminated against on the basis of their sex as a result of the creation and implementation of the BFOQ Plan at TCI. (Stip. Ex. 501). The Petitioners were each issued their respective 90-Day Right To Sue Notices and timely commenced their actions in district court.

B. Decisions Below.

1. *District Court Decision And Order.* The District Court held an eleven-day court trial which involved numerous witnesses and exhibits; additionally, Judge Warren toured TCI on the first day of trial. On May 16, 1986, Judge Warren issued the Decision and Order abolishing the TCI BFOQ Plan and reinstating the Petitioners to their prior sergeant positions. (A, p. 92a).

The District Court found that the Petitioners' presence in the housing units did not contribute to any security problems and did not impose any threat to the inmate's legitimate privacy interests. (A, pp. 84a-88a; 89a-92a). Privacy was protected in several ways, including allowing inmates to place "privacy cards" over the windows of the solid doors to their rooms during portions of the day while dressing or using their room toilets, use of the privacy curtain installed around room toilets, and procedures at TCI by which correctional officers of both genders did not observe inmates showering or using the toilet. (A, p. 92a).

With respect to rehabilitation, Switala testified that in her judgment prohibiting male correctional officers from working in the housing units contributed to inmate rehabilitation because giving female inmates an environment free from the presence of males in a position of

authority was necessary. She based her theory on her interviews and daily contact with female inmates, and believed that sixty percent of TCI's inmates had been physically and sexually abused by males in their past. (A, p. 88a).

Switala's testimony was confirmed by other witnesses, but her views were also contested by expert witnesses for the Petitioners who opined that the presence of males in the housing units was valuable to the female inmates' eventual ability to adjust in the outside world. (A, p. 88a). Judge Warren carefully weighed the testimony on both sides, noted that TCI's recidivism rate had not declined since the gender-based restrictions were imposed, and held that the Respondents had not sustained their heavy burden of establishing the BFOQ Plan based on their rehabilitation theory.[2] (A, pp. 88a-89a).

2. *Court of Appeals Panel Opinion.* The panel Opinion of the Court of Appeals for the Seventh Circuit affirming the judgment of the District Court was issued on January 29, 1988. By a 2-1 vote, the panel affirmed the District Court's findings that the Respondents failed to sustain their heavy burden of justifying the TCI BFOQ

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[2]Respondents raised the deference argument at the close of trial in moving for judgment, claiming that the District Court should defer to the determination of DHSS and Switala concerning the creation and implementation of the TCI BFOQ Plan. (TR, Vol. 11, p. 166). The District Court, while recognizing the deference principles contained in conditions of confinement cases, found that this was not such a case, that the BFOQ exception was a narrow one, and that a party seeking to come within the same had a heavy burden. (TR, Vol. 11, p. 179). The District Court also implicitly rejected the deference argument in its Decision and Order.

Plan on security, privacy, and rehabilitation grounds.[3] (A, pp. 37a-67a, *infra*).

3. *Court of Appeals En Banc Opinion.* An *en banc* rehearing resulted in a reversal of the panel Opinion and Judgment on October 17, 1988, by an 8-3 margin, Judges Cudahy, Easterbrook, and Cummings dissenting. The *en banc* court in its entirety agreed, however, that neither prison security nor the females' privacy interests justified the TCI BFOQ Plan. (A, p. 12a).

The *en banc* Opinion, for which Petitioners seek a writ of certiorari, basically held that the decision of prison administrators to employ female correctional officers only should be given substantial weight in deciding what constitutes a lawful BFOQ. (A, pp. 21a-22a). The *en banc* court also ruled that Judge Warren was in error in requiring that the Respondents introduce objective evidence to support their rehabilitation theory, and that the BFOQ Plan could be justified on the basis of experimentation and innovation. (A, pp. 21a-23a).

The dissenting Judges, Cudahy, Easterbrook, and Cummings, argued that Judge Warren was correct in ruling that the Respondents had not sustained their heavy burden in justifying a gender-based BFOQ, and that the majority

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[3]The majority dismissed the Respondents' deference argument, noting that while deference generally is accorded to prison administrators concerning prison management in some contexts, it was not to be accorded in employment discrimination actions. Rather, a prison administrator attempting to avail himself of the BFOQ exception must meet the same burden of proof imposed on any employer attempting to avail himself of the same. The majority also noted that deference had not been accorded to prison administrators by other federal courts in BFOQ cases. (A, p. 47a).

was in error in interpreting Judge Warren as only requiring empirical evidence. (A, pp. 23a-29a; 29a-36a). The majority, they said, created a prison exception to the BFOQ standard and the generally applicable rule that gender-based distinctions must be substantiated by real evidence. (A, pp. 26a, 34a). Judge Easterbrook observed that mere rationality does not justify a gender-based BFOQ, and noted that "no solid evidence shows that conditions at a prison affect recidivism". (A, pp. 32a, 34a-35a).

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REASONS FOR GRANTING THE PETITION

I. WHAT THIS CASE IS ABOUT.

This case is not about privacy, nor about prison security. All judges in this case agree that privacy and security interests are not jeopardized by allowing male correctional officers in the female inmates' housing units; accordingly, it has been uniformly held in this case that neither security nor inmate privacy justify the TCI BFOQ Plan. (A, pp. 12a; 47a-49a; 49a-57a; 84a-88a; 89a-92a).

The only issue in this case is whether a *theory* of inmate rehabilitation justifies gender discrimination. The Respondents claim that because sixty percent of the female inmates had been physically and sexually abused by men, their rehabilitation will be improved if only female correctional officers are utilized in inmate housing units. The District Court, after evaluating conflicting claims and the testimony of experts, decided there was insufficient evidence to justify this theory of rehabilitation. (A, pp. 88a-89a). The *en banc* court reversed. The Petitioners have

found no prison-sex BFOQ case allowing gender discrimination under the BFOQ exception to Title VII where the employer's interest did not relate to matters of privacy or the security of the employee. The *en banc* Opinion, therefore, is unprecedented.

This case also gives this Court an opportunity to rule on the extent to which real evidence rather than opinion evidence is necessary to justify otherwise forbidden discrimination under the BFOQ exception. See *Wards Cove Packing Company, Inc. v. Antonio*, Case No. 87-1387, review granted, to be argued January 18, 1989.

Lastly, this case raises the issue of whether deference to the decision of a prison administrator to discriminate under the guise of a BFOQ is appropriate, and allows this Court to provide guidance in the prison-sex BFOQ area and clarify any issues raised by this Court's decision in *Dothard v. Rawlinson*, 97 S.Ct. 2720 (1977).

II. THE PETITION SHOULD BE GRANTED BECAUSE IN REQUIRING DEFERENCE TO A PRISON ADMINISTRATOR'S DECISION TO DISCRIMINATE UNDER A BFOQ PLAN THE EN BANC OPINION DIRECTLY AND IRRECONCILABLY CONFLICTS WITH DECISIONS OF THE SUPREME COURT AND OF VARIOUS CIRCUITS.

Title VII prohibits discrimination in employment on the basis of sex; however, it does contain an exception to its strong prohibition against sex discrimination in employment, which exception is entitled "bona fide occupational qualification" (BFOQ). See 42 U.S.C. § 2000e-2(e). The BFOQ exception provides only the narrowest of exceptions to Title VII, as is illustrated by the various formulations

of the BFOQ exception by the courts. *Dothard, supra,* at p. 2729.[4] Additionally, the extremely narrow scope of the BFOQ exception does not encompass discrimination on the basis of sex where said discrimination is predicated on culturally based stereotypical characterizations of the sexes. *Dothard, supra,* at p. 2729; 29 C.F.R. § 1604.2(a)(1)(ii).

Although the burden of establishing a *prima facie* case of sex discrimination rests with the plaintiff in a Title VII action, where as here the employer relies on the BFOQ exception, a *prima facie* case of overt discrimination is established by said reliance. *Harden v. Dayton Human Rehabilitation Center,* 520 F. Supp. 769, 777 (S.D. Ohio 1981), *aff'd* 779 F.2d 50 (6th Cir. 1985). The burden then shifts to the employer to establish that its employment practices fall within the BFOQ exception which burden, because of

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[4]The conclusion reached by the Supreme Court concerning the narrowness of the BFOQ exception was based on the restrictive language of the statutory exception itself, the relevant legislative history thereof, and the consistent interpretation thereof by the EEOC. *Dothard, supra,* at p. 2729.

With respect to the legislative history thereof, note that the legislative history expressly indicates that the BFOQ exception was meant to be narrowly construed. See *Weeks v. Southern Bell Telephone and Telegraph Co.,* 408 F.2d 228, 232 (5th Cir. 1969); 110 Cong. Rec. 7213 (1964); H.R. Rep. No. 914, 88 Cong. 1st Session (1963), which refers to the use of the BFOQ exception as being in "rare situations".

Regarding the EEOC's interpretation of the BFOQ exception as to sex, "[T]he commission (EEOC) believes that the bona fide occupational qualification exception as to sex should be interpreted narrowly." 29 C.F.R. § 1604.2(a). The EEOC has adhered to the above principle consistently, and its construction of said statute can accordingly be given weight. *Dothard, supra,* at p. 2729.

the extreme narrowness of the exception, is a very heavy one. *Fesel v. Masonic Home of Del., Inc.*, 447 F. Supp. 1346, 1350 (Del. 1978), *aff'd* 591 F.2d 1334 (3rd Cir. 1979); *Griffen v. Michigan Dept. of Corrections*, 654 F. Supp. 690, 700 (E.D. Mich. 1982). This heavy burden is illustrative of why the BFOQ exception is justified only in rare, appropriate circumstances. *Manley v. Mobil County, Ala.*, 441 F. Supp. 1351, 1357 (S.D. Ala. 1977).

The *en banc* court held that deference was to be accorded to a prison administrator discriminating on the basis of sex under the guise of a BFOQ. (A, pp. 21a-22a). The holding of the *en banc* court is in direct conflict with Supreme Court precedent and decisions of other circuits, however, as will next be examined.

Initially, it is to be noted that the Supreme Court has heard only one prison-sex BFOQ case, that being *Dothard, supra*, which was decided in 1977. The *en banc* Opinion is squarely in conflict with that decision.

The deference principles argued for by the Respondents and adopted by the *en banc* court find their source in the prisoners' rights line of cases, of which *Procunier v. Martinez*, 94 S.Ct. 1800 (1974), is the seminal case. Those principles provide that prison administrators, and not courts, are to make the difficult judgments concerning institutional operations. *Jones v. North Carolina Prisoners' Union*, 97 S.Ct. 2532, 2539 (1977). Notwithstanding the availability of the deference principles to the Supreme Court in *Dothard, supra*, the Supreme Court did *not* defer, expressly or otherwise, to the judgment of the prison administrators in implementing the BFOQs at issue, but rather analyzed the case by applying the BFOQ principles

and standards enunciated therein to the factual background. Thus, in the only prison-sex BFOQ case ever decided by the Supreme Court, this Court did *not* defer to the decision of the prison administrator to discriminate per a BFOQ, nor did it require courts to defer to such decisions in prison-sex BFOQ cases to be subsequently decided.[5]

The holding of the *en banc* court requiring deference to prison administrators in Title VII actions is also in direct conflict with the Supreme Court's holding in *Western Air Lines v. Criswell*, 105 S.Ct. 2743 (1985). *Criswell*, although a case brought under the ADEA, concerned the BFOQ exception thereto, which was crafted from the Title VII BFOQ exception. *Id.*, at p. 2750. In that case this Court held that deference was not required to the employer's choice of reasonable job restrictions. *Id.*, at p. 2754. Rather, deference was at odds with Congress' decision in adopting the ADEA to subject such management decisions to a test of objective justification in a court of law. *Id.*, at p. 2754. This Court also noted that to require a fact

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[5]The *en banc* court's contention that the Supreme Court in *Dothard, supra*, "implicitly" deferred to a "limited degree" to the prison administrators therein is plainly at odds with the BFOQ discussion contained in *Dothard*. (A, pp. 18a-19a). Rather, it was stated in *Dothard, supra*, that the legislative history of Title VII precluded deference, requiring that private and public employers be treated alike. The Supreme Court went on to state that an employer's practice must pass independent muster to survive a Title VII challenge. *Id.*, at footnote 14, p. 2728.

Note also that Judge Cudahy and Judge Easterbrook, in their respective dissents, argue that the *en banc* court's approach cannot be reconciled with the holding in *Dothard, supra*. (A, pp. 26a, 34a-35a).

finder to defer to the employer's experts, no matter how unpersuasive, would allow some employers to give free reign to prohibited stereotypes. *Id.*, at p. 2756. Thus, the *en banc* court's decision to require deference to a decision of a prison administrator to discriminate per a BFOQ is plainly in direct and irreconcilable conflict with *Criswell.*

In addition to the above direct and irreconcilable conflicts with Supreme Court precedent, the *en banc* court is the first court in the nation to require deference to the decision of a prison administrator to discriminate per a BFOQ. In fact, every other circuit which has addressed the issue of the appropriateness of a BFOQ for a prison guard position has found that sex was *not* a BFOQ for said position(s). See *Harden, supra; Hardin v. Stynchcomb*, 691 F.2d 1364 (11th Cir. 1982); *Forts v. Ward*, 621 F.2d 1210 (2nd Cir. 1980); *Gunther v. Iowa State Men's Reformatory*, 612 F.2d 1079 (8th Cir. 1980), *cert. den.* 100 S.Ct. 2942 (1980).[6] The *en banc* Opinion, thus, will create

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[6]It has been generally recognized that in the absence of unusual circumstances such as existed in *Dothard, supra*, federal courts have been unwilling to characterize sex as a BFOQ for the position of correctional officer. See, e.g. *Reynolds v. New York Dept. of Corr. Serv.*, 568 F. Supp. 747, 749 (S.D. N.Y. 1983); 70 O.A.G. 202, 207 (1981); *Forts v. Ward*, 471 F. Supp. 1095, 1099 (S.D. N.Y. 1979), *rev'd in part on other grounds*, 621 F.2d 1210. See also *Edwards v. Department of Corrections*, 615 F. Supp. 804 (M.D. Ala. 1985), wherein the district court held that sex was not a BFOQ for the position of shift commander at the women's prison in Alabama.

Note also that at the Federal Women's Prison in Alderson the staff composition is 45% male and 55% female, and that with the exception of strip and cavity searches and urinalysis, there are no policies which distinguish between male and fe-

(Continued on following page)

conflict and confusion among the various circuits as to whether deference should be applied in a Title VII action, which conflict should be authoritatively resolved by the Supreme Court.

Obviously, the impact of the *en banc* court's deference requirement will be felt throughout corrections, as courts will now be required to defer to prison administrators' decisions to discriminate under the guise of a BFOQ. A further result of the deference requirement will be holdings that prison-sex BFOQs are justified, whereas they had previously been held unjustified.

The impact of the *en banc* Opinion goes beyond corrections, however. If deference is to be accorded to prison administrators' discriminatory decisions per the prisoners' rights deference principles, it will most certainly be argued to apply to employers whose decisions are also traditionally deferred to by the courts (i.e. school administrators—see A, pp. 26a-27a). Since private and public employers are to be treated alike under Title VII per the legislative history thereof, private employers could also argue that deference is appropriate in their particular circumstances due to their expertise with respect to their particular business. What the *en banc* Opinion has done is opened a Pandora's Box regarding deference which has no logical stopping point and which could result in the extremely

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(Continued from previous page)

male correctional officers; there are also no gender-based restrictions on post assignments. (Stip. Ex. 613, pp. 12-13, 13).

Notwithstanding the above, Judge Easterbrook in his dissent correctly points out that the effect of the *en banc* Opinion is to say that sex may be a BFOQ for every female prison, and maybe every prison, in America. (A, p. 31a).

narrow BFOQ exception swallowing the strong Title VII prohibition of discrimination in employment. See *Diaz v. Pan Am World Airways, Inc.*, 442 F.2d 385 (5th Cir. 1971). Courts must not abdicate their function of overseeing our important anti-discrimination laws by deferring to the judgment of the discriminating employer to discriminate.

It is respectfully submitted that this Court should act now to resolve the aforementioned conflicts and the potential problems created by the *en banc* Opinion by granting this Petition and reversing said Opinion.

III. THE PETITION SHOULD BE GRANTED BECAUSE DEFERENCE TO PRISON ADMINISTRATOR DECISIONS IS INAPPROPRIATE WHEN SEX DISCRIMINATION IN THE EMPLOYMENT OF CORRECTIONAL OFFICERS IS CHALLENGED.

In this case the *en banc* court agreed that the Respondents' burden to justify sex discrimination was heavy, but then proceeded to conclude that the heavy burden was sustained with slight evidence, because that court preferred a policy of judicial deference to prison administrators. (A. pp. 18a, 21a-23a). The BFOQ exception requires more, and this Court requires more. One of the claims in *Dothard, supra*, was that height and weight qualifications were justified. This Court rejected that claim because:

> ". . . the appellants produced no evidence correlating the height and weight requirements with the requisite amount of strength thought essential to good job performance." *Id.*, at p. 2728.

Because this Court does not lightly tolerate gender discrimination, prison administrators, especially when deal-

ing with employment decisions and with fundamental rights, are not to be presumed correct. This Court insists that strong evidence justify deprivations of important rights, even when prison rules are reviewed.

In *Procunier, supra,* this Court rejected a hands-off approach to the examination of restrictions on inmate mail, and contact with lawyers. Courts should examine closely any restrictions that burden basic interests:

> "When a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights." *Id.*, at pp. 1807-1808.

Turner v. Safley, 107 S.Ct. 2254 (1987), similarly commands district courts to give heightened scrutiny to prison rules impinging upon basic rights. *Turner* involved inmate claims. This case concerns the statutory, if not constitutional, rights of state employees. Since this Court insists on strong evidence to justify deprivation of important rights in the prisoners' rights line of cases, such should even more so be the case here where innocent employees' statutory, if not constitutional, rights are involved; deference to the prison administrator's decision to discriminate per a BFOQ is, therefore, clearly inappropriate. Thus, the Petition should be granted and the *en banc* Opinion reversed.

IV. THE EN BANC OPINION PERMITS SEX DISCRIMINATION PER A BFOQ WITHOUT AN ADEQUATE BASIS.

The *en banc* Opinion gives an employer license to discriminate per a BFOQ without having to shoulder its heavy burden of objectively justifying the same in a court

of law. Instead, per said Opinion, an employer can lawfully discriminate based on a reasoned belief that experimentation or innovation which involves sex discrimination is necessary. (A, pp. 21a-23a). Said holding is erroneous when viewed in light of Supreme Court precedent.

Of an obvious nature is that to allow an employer to discriminate on the basis of sex under a BFOQ purely on the belief of a need to experiment or innovate, without the necessity of objectively establishing the same, flies in the face of the BFOQ burden of proof standards enunciated in *Dothard*, *supra*, and followed in BFOQ cases ever since. Additionally, the *en banc* Opinion is in conflict with the legislative history of the BFOQ exception and its interpretation by the EEOC, which provides for a very narrow exception to be used in rare situations. See footnote 4, *infra*.

The *en banc* Opinion is further in conflict with the Supreme Court's holding in *Criswell*, *supra*, concerning the need for objective justification of a BFOQ defense. In *Criswell*, *supra*, this Court rejected the employer's deference argument by stating that management decisions such as implementing a BFOQ must be *objectively* justified in a court of law. The BFOQ standard is "reasonable necessity", not "reasonableness". *Id.*, at p. 2754. Indeed, if mere rationality sustained gender discrimination then decisions of this Court requiring heightened scrutiny of gender classifications would be wrong. Gender classifications, even those favoring females over males, require more than a mere rational basis. *Craig v. Boren*, 97 S.Ct. 451 (1976).

The *en banc* court goes even further, however, and provides that an employer can justify a sex-based BFOQ

on the need or desire to experiment and innovate, a holding standing starkly alone in BFOQ jurisprudence.[7] A, pp. 26a; 31a; 34a). Such a result cannot be sanctioned in light of Supreme Court precedent and must be reversed.

The *en banc* court relied on *Pime v. Loyola University of Chicago*, 803 F.2d 351 (7th Cir. 1986), and *Chambers v. Omaha Girls Club*, 834 F.2d 697 (8th Cir. 1987), in support of their holding that a BFOQ defense need not be established by objective evidence.[8] (A, pp. 19a-20a). This Court, however, is rightly skeptical of subjective decisions in the employment discrimination context. In *Watson v. Fort Worth Bank and Trust*, 108 S.Ct. 2777 (1988), this Court gave no special weight to subjective evidence, because had it done so the non-discrimination policies of Title VII would have been undermined. *Id.*, at p. 2786. The *en banc* Opinion in this case similarly threatens to

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[7]Both Judge Cudahy and Judge Easterbrook in their dissenting opinions provide that the *en banc* Opinion amounts to a prison exception to the BFOQ standard granting a prison administrator special latitude to experiment and innovate. (A, pp. 26a; 31a; 34a).

It is interesting to note that the Respondents' "innovative theory" of using only female correctional officers in the housing units had previously been the status quo at TCI for at least 30 years.

[8]It is submitted that both *Pime, supra,* which expressly referred to lack of objective justification (*Id.*, at p. 354), and *Chambers, supra,* are incorrectly decided. Instead, it is respectfully submitted that the dissenting opinion of Judge McMillian in *Chambers, supra,* embodies the correct analysis of the need for validation of a BFOQ defense. See e.g. *Chambers, supra,* at pp. 708-709 (McMillian, J., dissenting). Additionally, the victim of discrimination in *Chambers* was specifically identified as an undesirable role model; no such findings were made regarding the Petitioners in this case.

dilute, if not destroy, Title VII's non-discrimination commands.

This case does not rest on anything other than "an employer's bare opinion that segregation by sex is helpful." (A, p. 31a). The *en banc* court rejected the underlying premise of *Dothard*, namely that gender discrimination must be justified by showing a real basis for the discrimination. It is not enough that the gender discrimination be deemed "innovative"—it must be lawful as well.

As was the case with the *en banc* Opinion with regard to deference, said Opinion also will have a nationwide effect with respect to its holding that a BFOQ can be based merely on a reasoned belief and/or a need to experiment or innovate, without the necessity of objective justification in a court of law. To allow an employer to discriminate under the guise of a BFOQ without having to establish the same through the introduction of real or objective evidence, and to further allow a BFOQ based solely on a reasoned belief or a need to experiment or innovate would most certainly eviscerate the Title VII protection to which employees in America have become accustomed. See *Watson*, *supra*, at p. 2797 (Blackmun, Justice, concurring). Such a holding is directly contrary to Congress' intent in enacting anti-discrimination laws and as such should be reversed. See *Criswell*, *supra*, at p. 2754. Employers should not be given latitude to experiment or innovate at the expense of innocent employees' Title VII rights, and should not be allowed to act contrary to the strong prohibition against discrimination in employment based solely on their beliefs. (A, p. 60a). Thus, the Petition should be granted and the *en banc* Opinion reversed.

V. REHABILITATION CANNOT SERVE AS THE JUSTIFICATION FOR A BFOQ PLAN INSTITUTED AT A FEMALE PRISON BY THE PRISON ADMINISTRATOR.

A. Rehabilitation Is A Subordinate Goal In The Field Of Corrections And Cannot Serve As The Basis For A BFOQ.

Inmates incarcerated in correctional institutions have no abstract right to rehabilitation. *French v. Heyne,* 547 F.2d 994, 1002 (7th Cir. 1976). Although rehabilitation of inmates is one of the goals of correctional facilities, the central goal thereof is institutional security. *Pell v. Procunier,* 94 S.Ct. 2800, 2804 (1974). Additionally, the essence of a correctional officer's job is to maintain prison security. *Dothard, supra,* at p. 2730. Even Switala admitted that security predominated over rehabilitation when a conflict arose. (TR, Vol. 11, p. 11). Being that the essence of TCI and its correctional officers is security, rehabilitation is merely a tangential goal thereof. Rehabilitation cannot, therefore, serve as the basis for the TCI BFOQ Plan inasmuch as tangential goals cannot serve as the basis for a BFOQ defense. *Diaz, supra,* at p. 388. This Court should, accordingly, grant the Petition and reverse the *en banc* Opinion.

B. The En Banc Opinion Subordinates A Statutory Command Against Gender Discrimination To An Abstract Interest In Rehabilitation And Hence Burdens The Petitioners' Statutory, If Not Constitutional, Right To Equal Employment.

The *en banc* court subordinated the Petitioners' statutory, if not constitutional, right not to be victims of sex discrimination in preference to a less explicit interest in

rehabilitation. Interests in rehabilitation do not overcome interests in protecting basic rights. In *Turner, supra,* this Court unanimously declined to give deference to a prison administrator's view that female inmates should be prevented from marrying because marriage might diminish the inmates' rehabilitation. This Court rejected the rehabilitation justification offered by the government:

> "/P/rison officials testified that female prisoners often were subject to abuse at home or were overly dependent upon male figures, and that this dependence or abuse was connected to the crimes they had committed. The superintendent . . . testified that in his view, these women prisoners needed to concentrate on developing skills of self reliance, and that the prohibition on marriage furthered this rehabilitative goal." *Id.*, at p. 2266.

If restrictions on marriage trigger heightened scrutiny, so too should restrictions on employment because of gender. The rehabilitation justification that failed in *Turner* is surely comparable to the rehabilitation justification for sex discrimination offered in this case. Just as the right to marry is important, so also is the interest in not being discriminated against because of gender. Moreover, the Petitioners claim a statutory right not to be victims of gender discrimination. This is a stronger claim than the uncertain opinion that discrimination will assist rehabilitation. Sex discrimination is a serious socie-

tal problem, and should not be tolerated without the firmest evidence.[9]

In this case the Petitioners' right not to be discriminated against might also rest, were there no federal statute, on a Fourteenth Amendment claim. This Court observed in *Dothard* that:

> "In the case of a state employer, the bfoq exception would have to be interpreted at the very least so as to conform to the Equal Protection Clause of the Fourteenth Amendment." *Id.*, at footnote 20, p. 2729.

The right to be free of unjustified gender discrimination is of fundamental importance to prison employees. The policy of deference to prison administrators when inmates challenge the everyday conditions of confinement accordingly does not apply here.

Inasmuch as the *en banc* Opinion improperly subordinates the Petitioners' statutory, if not constitutional, right to equal employment in preference to a less explicit interest in rehabilitation, this Petition should be granted and said Opinion reversed.

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[9]The *en banc* court finds significant the fact that the State of Wisconsin has mandated rehabilitation as a correctional goal. (A, pp. 15a-16a). However, as noted by Judge Easterbrook in his dissent, an employer should not be allowed to define a trivial or impossible objective and then use said objective as justification for discrimination, for to allow the same would be to assign no weight to the interests protected by Title VII. (A, pp. 33a-34a).

Query also whether administrative alternatives must be attempted prior to implementing a BFOQ Plan based on rehabilitation; it is clear that such alternatives must be attempted prior to implementing a BFOQ Plan based on privacy. *Hardin, supra,* at p. 1374.

C. A Rehabilitation Theory Based On A Stereotypical Characterization Of The Sexes Cannot Be Used To Justify A BFOQ.

At trial, there was conflicting expert testimony concerning the effect of the presence of male correctional officers in the female inmates' housing units on rehabilitation.[10] (A, pp. 57a-59a). It is clear that sex discrimination in employment cannot be predicated upon a stereotypical characterization of the sexes. *Dothard, supra*, at p. 2729. This is true even if there is a statistical basis for the stereotyping. *City of Los Angeles, Dept. of Water v. Manhart*, 98 S.Ct. 1370, 1375 (1978). In *Mississippi University for Women v. Hogan*, 102 S.Ct. 3331 (1982), this Court stated that the validity of a gender-based classification:

> "must be applied free of fixed notions concerning the roles and abilities of males and females." *Id.*, at p. 3336.

The Respondents' views about male correctional officers in female inmates' housing units rest on fixed notions—indeed upon stereotypes—that males are aggressive, and that females are abused by them. Whatever the validity of the generalization there is no basis for applying that generalization to the individual Petitioners here. The record reveals that the Petitioners are trained and experi-

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[10]For example, Robert Ellsworth, an expert named by the Respondents and called adversely, and a former head of the Wisconsin Bureau of Adult institutions, testified that the presence of male correctional personnel in the housing units of a female prison, where any privacy concerns had been addressed, would have no detrimental psychiatric effect on rehabilitation but would rather aid the same. (TR, Vol. 6, pp. 63-64).

enced professionals. They were, under the Respondents' policies, demoted and stigmatized exclusively because of their gender, not because of their conduct.

Additionally, the Respondents' policy of removing male correctional officers from the housing units in the name of rehabilitation ignores the forty percent of the female inmates who had not been abused by males in the past and might benefit by interacting with them in the housing units and also those inmates who might have been physically or sexually abused by females in the past, and serves to perpetuate the stereotypical view that males are the aggressors and females are the abused. Such a patronizing and stereotypical theory cannot and should not be allowed to justify discrimination in employment per a BFOQ; this Court should, thus, grant this Petition and reverse the *en banc Opinion*.[11]

VI. THE EN BANC OPINION IS IN ERROR AND MUST BE REVERSED.

For the reasons addressed in detail in Arguments I-V of the Petition, the *en banc Opinion* is in error and must be reversed. Because of the nationwide significance of the *en banc* Opinion and the potential adverse affects to Title VII and BFOQ jurisprudence should said Opinion be al-

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[11]Judge Easterbrook notes in his dissent that a court should not take it as indisputable that women are different than men and then use that premise to justify sex differences in employment. (A, p. 31a). See also *Griffen, supra,* at p. 704 and *Gunther v. Iowa State Men's Reformatory,* 462 F. Supp. 952 (N.D. Iowa 1979), *aff'd* 612 F.2d 1079 (8th Cir. 1980), for cases where rehabilitation as a justification for a prison-sex BFOQ was rejected.

lowed to stand, it is respectfully requested that this Petition be granted and said Opinion be reversed.

VII. THIS CASE IS NOW RIPE FOR REVIEW.

The *en banc* court remanded this case to the District Court for redetermination of the BFOQ issue in accordance with the new standard contained in the *en banc* Opinion. (A, pp. 22a-23a). Should the case be so remanded, the District Court would be forced to apply the new, and as contended by the Petitioners' erroneous, legal standard to both evidence in the record and any newly submitted evidence in determining the BFOQ issue.

It is respectfully submitted by the Petitioners that this case presents important and clear-cut legal issues that are ripe for determination now, and that should be determined prior to remand (see Arguments I-V, *infra,* for a discussion of those legal issues). A reversal of the *en banc* Opinion by this Court would most certainly result in the affirmance of the District Court's judgment, and thus eliminate the necessity for the District Court and the parties to expend time and resources introducing more evidence on the rehabilitation issue and redetermining the same. The legal issues in question have been raised directly by the *en banc* Opinion, and inasmuch as the correctness of said Opinion is in doubt as previously addressed, said legal issues should be addressed head-on at this juncture. This is even more critical here because of the potential adverse impact should said Opinion be allowed to stand.

The Petitioners, therefore, respectfully request that this Court grant the Petition in that the legal issues raised herein are ripe for review.

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CONCLUSION

The *en banc* Opinion squarely conflicts with Supreme Court precedent and decisions from other circuits, and invites the development of BFOQ exceptions in ways that will mask discrimination and promote stereotypical attitudes. This is precisely what Title VII and the Constitution forbid. The legal issues raised by said Opinion are of vital concern to the nation as a whole as well as to individual victims of discrimination in employment. For these reasons, the Petitioners respectfully urge this Court to grant this Petition and reverse said Opinion.

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TABLE OF CONTENTS

		Page
1.	*En banc* opinion of the Seventh Circuit Court of Appeals.	1a
2.	Panel opinion of the Seventh Circuit Court of Appeals.	37a
3.	Decision and Order of the United States District Court, Eastern District of Wisconsin.	68a
4.	*En banc* Judgment of the Seventh Circuit Court of Appeals.	95a
5.	Panel Judgment of the Seventh Circuit Court of Appeals.	97a
6.	Judgment of the United States District Court, Eastern District of Wisconsin.	98a

In the
UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 86-2161

RAYMOND J. TORRES, FRANKLIN J. UTZ, AND GERALD F. SCHMIT,

Plaintiffs-Appellees,

v.

WISCONSIN DEPARTMENT OF HEALTH AND SOCIAL SERVICES, et al.,

Defendants-Appellants.

Appeal from the United States District Court
for the Eastern District of Wisconsin.
No. 83 C 629—Robert W. Warren, *Judge*

Argued December 9, 1986—Decided January 29, 1988
Reheard En Banc May 26, 1988—
Decided October 17, 1988

Before Bauer, *Chief Judge,* Cummings, Wood, Jr., Cudahy, Posner, Coffey, Flaum, Easterbrook, Ripple, Manion, and Kanne, *Circuit Judges.*

Ripple, *Circuit Judge.* Defendant Nona J. Switala is the superintendent of defendant Taycheedah Correctional Institution (TCI), the only women's maximum security prison in Wisconsin. TCI is operated by the Wisconsin Department of Health and Social Services (DHSS), also a defendant here. Ms. Switala, an experienced prison ad-

ministrator, determined that the rehabilitation of TCI's inmates would be enhanced by employing only female correctional officers in TCI's living units. The plaintiffs Raymond Torres, Franklin Utz, and Gerald Schmit were reassigned to other positions at TCI, with no loss in pay, because of this plan. Unhappy with this reassignment, the plaintiffs brought this action alleging sex discrimination by the defendants in violation of Title VII of the Civil Rights Act of 1964. 42 U.S.C. §§ 2000e to 2000e-17. The defendants responded that sex was a bona fide occupational qualification (BFOQ), 42 U.S.C. § 2000e-2(e)(1), for the positions formerly held by the plaintiffs. The district court determined that the defendants had not established a valid BFOQ because the defendants had not offered "objective evidence, either from empirical studies or otherwise," proving that the BFOQ would further inmate rehabilitation, and because prison security and inmate privacy were not materially advanced by the plan. We reverse and remand.

I

Facts

TCI has three buildings for housing inmates. Each building has three residence floors, and the inmates live in single, double, or multiple occupancy rooms. The rooms are not cells with bars, but are more akin to college dormitory rooms. Each room has a solid door with a clear glass window at eye level that is approximately four inches by six inches. The rooms have one bed per inmate, a desk, chair, light, toilet, and wash basin. In two buildings, privacy curtains have been installed around the toilets. When an inmate is behind the curtain, only her

feet are visible. At the time of trial, TCI had plans to install privacy curtains in the other residence building soon.

From 6 a.m. until 9 p.m., inmates may place "privacy cards" inside the door windows so that they can use the toilet or change their clothes without being observed. TCI's rules allow the privacy cards to be up for only ten minutes per day per inmate. In multiple inmate rooms, this means that the cards can be up permissibly for as much as thirty or forty minutes. However, the testimony offered at trial suggests that correctional officers are not able to keep careful track of the time that a privacy card has been in place, and that inmates sometimes leave their cards up for more than ten minutes per inmate. On one occasion, two inmates used their privacy card to facilitate an escape, and on another occasion an inmate beat up her roommate while the privacy card covered the window.

From 9 p.m. until 6 a.m., inmates may not place their privacy card on the inside of their window, but they may place their card outside the window all night long in order to prevent light from entering the room. Correctional officers then lift up the card for body counts and inspections. TCI's rules require that the officers conduct a body count each day at 7:30 a.m., 12:30 p.m., 5:30 p.m., 9:30 p.m., and once each hour between 10 p.m. and 6 a.m. Inmates know this schedule. TCI provides appropriate sleepwear for the inmates but they are not required to wear it. The guards are required to see the inmates' skin or hair during nighttime body counts.

Each floor of the residence buildings has a shower room. Inmates must sign up with their floor officer before

taking a shower, and they are required to wear some sort of clothing when walking to the shower room. Testimony at trial suggested that guards normally do not enter the shower rooms when occupied. The doors to the shower rooms are solid, although some contain windows that have been rendered opaque. The shower rooms have one to three shower stalls, one to three toilets, and some have one or more bathtubs. The showers and toilets have privacy curtains or privacy doors. Only one inmate may occupy the shower room at a time, except that roommates may enter together. TCI allows each inmate fifteen minutes in the shower room.

The Wisconsin Administrative Code allows prison officials to perform four types of inmate searches. Wis. Admin. Code § HSS 306.16 (1987). Correctional officers may perform pat searches at any time. During a pat search, inmates empty their pockets and the officer runs his or her hands over the inmates' entire body. § HSS 306.16(a). The custom at TCI is that only female guards perform pat searches. The second type of allowable search is the strip search. Strip searches must be authorized by a supervisor and performed in private by an officer of the same sex, except during emergencies. § HSS 306.16(b). The third type of search is the body cavity search. Body cavity searches are only performed by medical personnel in special circumstances. § HSS 306.16(c). The fourth permissible search is a body content search, such as urinalysis or blood analysis. § HSS 306.16(d). Under this regulation, body content searches are permitted only in extreme circumstances. In addition, correctional officers are expected to search occasionally inmates' rooms and the shower rooms when they are unoccupied.

Ms. Switala became superintendent of TCI in 1978. She previously had worked for three years as treatment director at TCI and for eight years as a probation and parole agent with the Wisconsin Division of Corrections. Ms. Switala, her superiors at the DHSS, and her personnel at TCI, soon began discussions regarding TCI's staffing needs. It ultimately was decided, principally by Ms. Switala, that certain positions at TCI should be staffed only by female correctional officers. It is clear from Ms. Switala's testimony at trial that the principal reason for this decision was her concern for inmate rehabilitation and security. TCI's administrators then advised all correctional officers in 1980 that a BFOQ program would be implemented gradually in the next two years.

TCI has three different ranks for its correctional officers. The lowest position is a correctional officer 1 (CO-1), followed by correctional officer 2 (CO-2) and correctional officer 3 (CO-3). The CO-3 in charge of a living unit is a "sergeant." The positions to be affected by the BFOQ plan were nineteen of the twenty-seven correctional officer positions in the living units, including all of the CO-3 posts in the living units. As a result of the plan, only three CO-3 positions at TCI would be open to men. The three plaintiffs, Mr. Torres, Mr. Utz, and Mr. Schmit, were all CO-3's prior to implementation of the BFOQ plan. Because of the limited number of available CO-3 positions, the three plaintiffs were required to accept CO-2 positions, although this demotion resulted in no loss of pay. The plaintiffs presently work under female CO-3's who have less seniority and experience.

II

The District Court Opinion

The district court first determined that the BFOQ is a narrow exception to Title VII's prohibition of discrimination in employment. The court noted that "administrative convenience is insufficient to justify a BFOQ exception," and that discrimination based on sex is permissible only " 'when the essence of the business operation would be undermined.' " *Torres v. Wisconsin Dep't of Health and Social Servs.*, 639 F. Supp. 271, 277 (E.D. Wis. 1986) (quoting *Diaz v. Pan Am. World Airways*, 442 F.2d 385, 388 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971)). The burden of establishing a BFOQ is a "heavy one," according to the court, and is "justified only in rare, appropriate circumstances." *Id.* at 278.

The court then analyzed the BFOQ under each of the defendants' proposed justifications: security, rehabilitation, and inmate privacy. Regarding security, the court found that male correctional officers had filled all of the BFOQ positions from 1975 until 1982 "without any contention that TCI suffered from a lack of security." *Id.* Moreover, the court noted that TCI continued to allow inmates to use privacy cards even after the BFOQ program had been installed, thus rebutting the argument that the presence of male guards reduced observation of the inmates. Although the court acknowledged that staffing problems at TCI might have been reduced by the BFOQ, since all guards then could perform all tasks, the court found that this justification merely constituted administrative convenience and not a genuine justification for sex discrimination. Thus, since the defendants had not presented evi-

dence of any decline in inmate escapes or violence as a result of the BFOQ the court found "that defendants have failed to justify the Plan based on security reasons." *Id.* at 279.

The court next analyzed the BFOQ under the defendants' rehabilitation justification. The court acknowledged that the defendants had "presented various witnesses familiar with the field of corrections who testified in support of this theory." *Id.* at 280. However, the court said that the plaintiffs also had presented witnesses who testified that male guards can enhance rehabilitation by "normaliz[ing]" the prison environment. *Id.* at 280 & n.9. Thus, the court determined that the defendants had offered only a "*theory* of rehabilitation as a justification for the BFOQ Plan. They offered no objective evidence, either from empirical studies or otherwise, displaying the validity of their theory." *Id.* at 280 (emphasis in original). Having concluded that the rehabilitation theory was unproven, the court refused to justify the BFOQ based on the theory.

The court concluded its analysis by reviewing the BFOQ under the justification of inmate privacy. The court ruled that inmates do have a constitutional right to be free from unwarranted privacy intrusions, but that this right necessarily was limited. *Id.* at 280-81. The court then determined that any intrusions of privacy occasioned by male guards were not unwarranted nor unreasonable because of other precautions taken by the prison administration. For example, the court noted that toilet facilities have privacy curtains, that correctional officers do not observe inmates while they are showering, and that guards do not see inmates unclothed except during an emergency or

when the inmate voluntarily allows it to happen. Therefore, the court found that privacy concerns did not justify the defendants' BFOQ plan.

Because the defendants had overtly discriminated against the plaintiffs on account of their sex, and since, in its view, there was no valid BFOQ, the court found that the defendants had violated Title VII. However, the court did not find that the plaintiffs were entitled to monetary damages. The court determined that the plaintiffs' reassignment had not caused any reduction in salary or overtime hours, and that therefore the plaintiffs had not established any monetary damages. For that reason, the plaintiffs' only remedy was an order abolishing the BFOQ plan and reinstating the plaintiffs in their prior assignments.

III

Analysis

A. *Title VII and the BFOQ*

We begin by reiterating several basic propositions, long established in the precedent, that must guide our decision today. "Title VII prohibits employment discrimination, which is 'one of the most deplorable forms of discrimination known to our society, for it deals not with just an individual's sharing in the "outer benefits" of being an American citizen, but rather the ability to provide decently for one's family in a job or profession for which he qualifies or chooses.' " *Hardin v. Stynchcomb*, 691 F.2d 1364, 1369 (11th Cir. 1982) (quoting *Culpepper v. Reynolds Metals Co.*, 421 F.2d 888, 891 (5th Cir. 1970)); *see also Rowe v. General Motors Corp.*, 457 F.2d 348, 354 (5th Cir. 1972). The statute forbids both overt discrimination and

practices that are " 'fair in form, but discriminatory in operation.' " *Pullman-Standard v. Swint*, 456 U.S. 273, 276 (1982) (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971)).

This case involves overt sex discrimination. It presents one issue—whether the district court correctly determined that sex was not a BFOQ for correctional officer positions at TCI. Section 703(e) of Title VII only permits classifications based on sex "where . . . sex . . . is a bona fide occupational qualification *reasonably necessary* to the normal operation of that particular business or enterprise." 42 U.S.C. § 2000e-2(e)(1) (emphasis supplied). It is universally recognized that this exception to Title VII was "meant to be an extremely narrow exception to the general prohibition of discrimination . . . ." *Dothard v. Rawlinson*, 433 U.S. 321, 334 (1977); *see also Pime v. Loyola Univ.*, 803 F.2d 351, 356 (7th Cir. 1986) (Posner, J., concurring). As the Supreme Court recognized in *Dothard*, this narrow exception "has been variously formulated." 433 U.S. at 333. " '[D]iscrimination based on sex is valid only when the *essence* of the business operation would be undermined by not hiring members of one sex exclusively.' " *Id.* (quoting *Diaz v. Pan Am. World Airways*, 442 F.2d 385, 388 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971) (emphasis in original)).[1] As an alternative formulation, noted the Supreme Court, it has been held that "an employer could rely on the BFOQ exception only by prov-

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[1] Under this formulation, the Fifth Circuit in *Diaz* rejected the contention that sex was a BFOQ for airline flight attendants because the airline's proposed justification—to provide a "pleasing environment" for passengers—was merely tangential to the airline's primary objective of providing safe transportation.

ing 'that he had reasonable cause to believe, that is, a factual basis for believing, that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved.'" *Id.* (quoting *Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F.2d 228, 235 (5th Cir. 1969)); *see also Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971).

It is also well established that a BFOQ may not be based on "stereotyped characterizations of the sexes." *Dothard*, 433 U.S. at 333. "Myths and purely habitual assumptions about a woman's [or a man's] inability to perform certain kinds of work are no longer acceptable reasons for refusing to employ qualified individuals, or for paying them less." *City of Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707 (1978). On the other hand, there are real as well as fictional differences between men and women. *Id.* For instance, the Supreme Court has never hesitated to recognize sex-based differences, particularly in cases involving physiology, marriage, childbirth, or sexuality. *See Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464, 469 (1981) ("[T]his Court has consistently upheld statutes where the gender classification is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances."); *id.* at 481 (Blackmun, J., concurring) ("The Constitution surely does not require a State to pretend that demonstrable differences between men and women do not really exist.") *See generally Parham v. Hughes*, 441 U.S. 347, 354 (1979) (opinion of Stewart, J.) ("In cases where men and women are not similarly situated, however, and a statutory classification is realistically based upon the differences in their situations, this

Court has upheld its validity."); *Schlesinger v. Ballard*, 419 U.S. 498, 508 (1975) ("[T]he different treatment of men and women . . . reflects, not archaic and overbroad generalizations, but, instead, the demonstrable fact that male and female line officers in the Navy are *not* similarly situated with respect to opportunities for professional service." (emphasis in original)). This same principle has been recognized in the Title VII area. *See, e.g., Backus v. Baptist Medical Center*, 510 F. Supp. 1191, 1195 (E.D. Ark. 1981), *vacated because of mootness*, 671 F.2d 1100 (8th Cir. 1982) (recognizing the need to have female registered nurses care for obstetrical patients); *see also* I A. Larson & L. Larson, *Employment Discrimination—Sex* § 14.30 (1987) ("[G]iving respect to deep-seated feelings of personal privacy involving one's own genital area is quite a different matter from catering to the desire of some male airline passengers to have . . . an attractive stewardess.").

Nevertheless, while recognizing that sex-based differences may justify a limited number of distinctions between men and women, we must discipline our inquiry to ensure that our tolerance for such distinctions is not widened artificially by—as the district court aptly put it—our "own culturally induced proclivities." *Torres*, 639 F. Supp. at 278. Nor, of course, can we tolerate the same preconceptions or predilections on the part of employers. Rather, we must ask whether, given the reasonable objectives of the employer, the very womanhood or very manhood of the employee undermines his or her capacity to perform a job satisfactorily. *Dothard*, 433 U.S. at 336.

One of the most important means by which an appellate court disciplines its inquiry is by keeping in mind the

appropriate standard of review. The district court's "[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." Fed. R. Civ. P. 52(a). In *Anderson v. City of Bessemer City*, the Court said that a finding is clearly erroneous when "'the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" 470 U.S. 564, 573 (1985) (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)). "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Id.* at 574. Of course, this deferential standard of review presumes that the district court has applied correct legal standards—decisions of law are reviewed *de novo*.

B. *The "Business" of the Employer*

With the foregoing propositions reaffirmed, we turn to the case before us. In our view, the decision of the district court that the defendants' BFOQ plan cannot be justified by concerns for prison security or for the basic privacy rights of the inmates is correct in law and fact. Thus, we turn to the only remaining question: whether the district court properly rejected defendants' contention that the BFOQ was necessary to further their goal of inmate rehabilitation.

The validity of a BFOQ can only be ascertained when it is assessed in relationship to the business of the employer. Our first step, therefore, must be to come to an understanding of the employer's business—its mission and

the methodologies necessary to fulfill that mission. In accomplishing this task, we cannot deal in generalities. *See Trans World Airlines v. Thurston,* 469 U.S. 111, 122 (1985). Rather, we must focus on the "particular business" of the employer in which the protected employee worked. *Id.* Oftentimes, this task requires that a court recognize factors that make a particular operation of an employer unique or at least substantially different from other operations in the same general business or profession. *See Pime v. Loyola Univ.,* 803 F.2d 351, 353-54 (7th Cir. 1986) (upholding the maintenance of a Jesuit "presence" as "important to the successful operation of the University," when there was evidence that it was "significant to the educational tradition and character of the institution that students be assured a degree of contact with teachers who have received the training and accepted the obligations which are essential to membership in the Society of Jesus").

Here, of course, the broadest description of the "business" of the defendants is to say that they are in the business of governance at the state level. This general description, standing alone, gives them no special license with respect to Title VII. In *Dothard v. Rawlinson,* 433 U.S. 321, 332 n.14 (1977), the Supreme Court said that "Congress expressly indicated the intent that the same Title VII principles be applied to governmental and private employers alike." A more precise definition of the "business" of the defendants is to recognize that they are in the business of administering a penal institution. Few tasks are more challenging. As the Supreme Court has explained:

> Prison administrators are responsible for maintaining internal order and discipline, for securing their institutions against unauthorized access or escape, and for rehabilitating, to the extent that human nature and inadequate resources allow, the inmates placed in their custody. The Herculean obstacles to effective discharge of these duties are too apparent to warrant explication. Suffice it to say that the problems of prisons in America are complex and intractable . . . .

Procunier v. Martinez, 416 U.S. 396, 404-05 (1974). Those who assume the responsibility of administering any prison must grapple with the "perplexing sociological problems of how best to achieve the goals of the penal function in the criminal justice system: to punish justly, to deter future crime, and to return imprisoned persons to society with an improved chance of being useful, law-abiding citizens." *Rhodes v. Chapman*, 452 U.S. 337, 352 (1981); *see also Bell v. Wolfish*, 441 U.S. 520, 547-48 (1979). *See generally Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. 119, 127-29 (1977). In fulfilling these responsibilities, prison administrators always have been expected to innovate and experiment. *See Turner v. Safley*, 107 S. Ct. 2254, 2262 (1987) (prison administrators must be allowed "to adopt innovative solutions to the intractable problems of prison administration"). Unless prison administrators try new approaches, the "intractable problems" will remain and the lot of the incarcerated individual will not improve. Indeed, it probably will deteriorate.

This general description of the task of prison administrators is still too general to permit us to assess accurately the claims of the parties. In *Dothard*, the Supreme Court focused not on maximum security institutions as a generic

class but rather on the environment then existing in Alabama's penitentiaries—"a peculiarly inhospitable one for human beings of whatever sex." 433 U.S. at 334. In conformity to the mandate of the Supreme Court in *Dothard*, we must therefore refine further our focus. The defendants here are charged with the administration of a distinct type of penal institution—a women's maximum security facility. As the district court and one of the plaintiffs' own witnesses quite candidly acknowledged,[2] the same historical and empirical evidence that might guide the administrator of a similar institution for males simply is not available with respect to this environment. Therefore, the administrators of TCI were obliged, to a greater degree than their counterparts in male institutions, to innovate in achieving one of the tasks mandated by the Wisconsin legislature—rehabilitation. The defendants' "business" explicitly included—by legislative mandate—the task of rehabilitation. *See* Wis. Admin. Code §§ HSS 303.01(3)(c), HSS 306.01 (1987). One of the plaintiffs' expert witnesses testified that this goal was not considered, in modern penological theory, a high priority or, by some, even a realistic goal. Tr. 6 at 160 (testimony of Dr. David Kalinich). Wisconsin has made a contrary decision and rehabilitation, no matter how elusive, must be at-

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[2] Dr. David Kalinich, a professor of criminal justice at Michigan State University, testified that he was not aware of any research regarding male correctional officers in female prisons. Tr. 6 at 138, 142. When the defendants challenged Dr. Kalinich's qualifications as an expert because he lacked experience in dealing with female institutions, the district court responded that there was not enough research on the subject of female institutions "for us to be too chary about applying generalized expertise in this area." *Id.* at 143.

tempted. Wisconsin's goal is clearly a reasonable course, *see Rhodes*, 452 U.S. at 352, and we must accept it as part of the "business" of the defendants.

C. *Rehabilitation: The TCI Approach*

Ms. Switala, the superintendent of TCI, made a professional judgment that giving women prisoners a living environment free from the presence of males in a position of authority was necessary to foster the goal of rehabilitation. This decision was based on Ms. Switala's professional expertise and on her interviews and daily contact with female prisoners. Tr. 10 at 110-11. She also based her decision on the fact that a high percentage of female inmates has been physically and sexually abused by males. Indeed, she noted that sixty percent of TCI's inmates have been so abused. Tr. 9 at 39.

1.

There can be no question that the proposed BFOQ is directly related to the "essence" of the "business"—the rehabilitation of females incarcerated in a maximum security institution. *See Dothard*, 433 U.S. at 333 (quoting *Diaz v. Pan Am. World Airways*, 442 F.2d 385, 388 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971)). As we already have noted, the Wisconsin legislature has mandated that rehabilitation is one of the objectives of that state's prison system. *See* Wis. Admin. Code §§ HSS 303.01(3)(c), HSS 306.01 (1987). Therefore, we stress that this is not a case where the interest of the plaintiffs in their continued employment simply conflicts with the basic privacy rights of the inmates. Here, the interest of the plaintiffs con-

flicts with the task of the administrators to rehabilitate the inmates for whom they are responsible. *Forts v. Ward*, 621 F.2d 1210 (2d Cir. 1980), involved a female penitentiary. However, in that case, the suit was brought by prisoners against prison administrators. The prisoners sought to enjoin the administrators from assigning male guards to duties in the housing units of the prison. *Forts* therefore involved a straightforward conflict between the prisoner's right to privacy and the guards' rights, secured by Title VII, to employment security. Rehabilitation was not an issue in the case; the administrators made no claim that the presence of male personnel interfered with the performance of their duty. By contrast, this case involves just such a claim. Consequently, we are not dealing here with a mere matter of "consumer preference." *See Fernandez v. Wynn Oil Co.*, 653 F.2d 1273 (9th Cir. 1981); *Diaz v. Pan Am. World Airways*, 442 F.2d 385, 389 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971). *See generally* Schlei & Grossman, *Employment Discrimination Law* 341 (2d ed. 1983). The issue here is not what the prisoners want or believe is beneficial or appropriate. Rather, the issue is whether the state, charged with the responsibility of rehabilitation—a responsibility not only to the inmate but to the public—may pursue that goal in the manner at issue here.

2.

The more difficult question is whether the proposed BFOQ was "reasonably necessary" to furthering the objective of rehabilitation. The defendants can establish that the BFOQ was reasonably necessary only if they "had reasonable cause to believe, that is, a factual basis for

believing, that all or substantially all [men] would be unable to perform safely and efficiently the duties of the job involved." *Dothard*, 433 U.S. at 333 (quoting *Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F.2d 228, 235 (5th Cir. 1969)).

The district court determined that the defendants had not met this hurdle because "[t]hey offered no objective evidence, either from empirical studies or otherwise, displaying the validity of their theory." *Torres*, 639 F. Supp. at 280. We respectfully differ with our colleague in the district court as to the legal appropriateness of this standard. Certainly, there is no general requirement that the necessity of a BFOQ be established by this type of evidence. In *Dothard*, the Supreme Court determined that Alabama prison officials were justified in removing female guards from the state's "peculiarly inhospitable" penitentiaries. 433 U.S. at 334. The Court said that "[t]here is a basis in fact for expecting that sex offenders who have criminally assaulted women in the past would be moved to do so again if access to women were established within the prison." *Id.* at 335. The Court also said that there would "be a real risk that other inmates, deprived of a normal heterosexual environment, would assault women guards because they were women." *Id.* (footnote omitted). These appraisals were not based on objective, empirical evidence, but instead on a common-sense understanding of penal conditions, and, implicitly, on a limited degree

of judicial deference to prison administrators.[3] As noted earlier, in *Pime v. Loyola University*, 803 F.2d 351 (7th Cir. 1986), this court held that a Jesuit university could discriminate permissibly in favor of Jesuit instructors even though it had "not been shown that Jesuit training is a superior academic qualification, applying objective criteria, to teach the particular courses." *Id.* at 354. Similarly, in *Chambers v. Omaha Girls Club*, 834 F.2d 697 (8th Cir. 1987), the Eighth Circuit held that a BFOQ need not always be supported by objective evidence. The Omaha Girls Club had discharged an unmarried pregnant staff member. The Club expected its staff members "to act as role models for the girls, with the intent that the girls will seek to emulate their behavior." *Id.* at 699. The court concluded that the Club's "role model rule" was justified by business necessity even though the plaintiff contended that "the role model rule is based only on speculation by the Club and has not been validated by any studies showing that it prevents pregnancy among the Club's members." *Id.* at 702. The court said:

> Although validation studies can be helpful in evaluating such questions, they are not required to maintain a successful business necessity defense. Indeed, we are uncertain whether the role model rule by its

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[3] As in *Dothard*, the Court in *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400 (1985), suggested that an employer need not always validate a BFOQ with objective, empirical studies. The Court said that the defendant airline did not need "to establish the risk of an airline accident 'to a certainty . . . .'" *Id.* at 419 (quoting *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224, 238 (5th Cir. 1976)). So long as the airline's "argument has a *credible basis in the record*," the jury could permissibly "defer in a close case to the airline's judgment." *Id.* at 420 (emphasis supplied).

> nature is suited to validation by an empirical study. Consequently, the court's conclusion in *Hawkins* [*v. Anheuser-Busch, Inc.*, 697 F.2d 810 (8th Cir. 1983)] is apt in this case: "We cannot say . . . that validation studies are always required and we are not willing to hold under the facts of this case that such evidence was required here."

Id. (footnote and citations omitted). Certainly, it is hardly a "[m]yth or purely habitual assumption," *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707 (1978), that the presence of unrelated males in living spaces where intimate bodily functions take place is a cause of stress to females. *See, e.g., EEOC v. Mercy Health Center*, 29 FEP 159, 163 (W.D. Okla. 1982) (employment of male nurses in labor and delivery area would cause medically undesired tension); *Backus v. Baptist Medical Center*, 510 F. Supp. 1191, 1194 (E.D. Ark. 1981) (same); *Norwood v. Dale Maintenance System*, 590 F. Supp. 1410, 1422-23 (N.D. Ill. 1984) (stress when attendant in office washroom is of opposite sex).

There is, it would seem, a substantial question as to whether the sort of problem that the defendants' BFOQ plan was designed to resolve ever "is suited to validation by an empirical study." *Id.* at 702. We need not resolve this matter definitively here.[4] In this case, there

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[4] We are aware that the district court noted that Ms. Switala testified that the recidivism rate of 8 to 12 percent had not diminished during the BFOQ program. We do not believe that this factor taken alone is of any great relevance. First of all, the plaintiffs made no showing that such data, representing a relatively short time frame, is significant. Second, rehabilitation involves more than avoiding recidivism. It involves enhancing the individual's potential for personal achievement. This factor is not easily subject to emirical study.

was general agreement among the parties and the district court that such material simply did not exist. One of the plaintiffs' own witnesses, Dr. David Kalinich, testified that there is little scholarship in the area of rehabilitation of the female felon. Tr. 6 at 138, 142. The plaintiffs emphasized this point by failing to introduce any witness with substantial experience or who had done scholarly work in the field of rehabilitation within female institutions. The plaintiffs' case was, to a very great extent, based on experts who had experience in male, not female, institutions. Indeed, the district judge, in accepting the credentials of Dr. Kalinich despite his lack of background in female institutions, specifically noted that comparable information about female institutions—and comparable experts—simply were not available. Tr. 6 at 143.

We believe, therefore, that the defendants were required to meet an unrealistic, and therefore unfair, burden when they were required to produce "objective evidence, either from empirical studies or otherwise, displaying the validity of their theory." *Torres*, 639 F. Supp. at 280. Given the nature of their "business"—administering a prison for female felons—the defendants, of necessity, had to innovate. Therefore, their efforts ought to be evaluated on the basis of the totality of the circumstances as contained in the entire record. In the Title VII context, the decision of penal administrators need not be given as much deference as accorded their decisions in constitutional cases. *Whitley v. Albers*, 475 U.S. 312, 321-22 (1986); *Rhodes v. Chapman*, 452 U.S. 337, 351-52 (1981); *Bell v. Wolfish*, 441 U.S. 520, 547 (1979). However, their judgments still are entitled to substantial weight when they are the product of a reasoned decision-making process,

based on available information and experience. The fact that the program is considered a reasonable approach by other professional penologists also is a factor to be given significant consideration. In an area where the questions are so many and the answers so few, the range of reasonable options must necessarily be more extensive. Certainly, the court ought not require unanimity of opinion and ought not to substitute completely its own judgment for that of the administration.[5]

Conclusion

Because the district court resolved the issue before it on the ground that there was a lack of "objective evidence, either from empirical studies or otherwise," 639 F. Supp. at 280, it had no occasion to evaluate the entire record, according the decision of the administrator the appropriate weight. Accordingly, we believe that this matter ought to be remanded to the district court for further consideration. After the parties have had an opportunity to submit additional evidence, the court may redetermine the issue in accordance with the standard set forth in this opinion.

Finally, we emphasize that it would be a mistake to read our decision today as a signal that we are willing to allow employers to elude Title VII's requirements simply by arguing that they were "innovating." Rare is the employment situation in which an employer could argue

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[5] The district judge toured the prison during trial. Whatever the benefit of such an inspection with respect to matters of privacy and security, such an exercise is not relevant in determining the legitimacy of the defendants' rehabilitation program.

that gender-based distinctions are a "reasonably necessary" approach to innovation in one's business. We hold only that, given the very special responsibilities of these defendants and the obvious lack of guideposts for them to follow, it was error to require that they adopt only a course that was subject to objective validation. Accordingly, the judgment of the district court is reversed and the case is remanded for proceedings consistent with this opinion. Circuit Rule 36 shall not apply.

REVERSED and REMANDED

CUDAHY, *Circuit Judge*, with whom Circuit Judges Cummings and Easterbrook join, dissenting:

In dissent, I would rely primarily on my opinion for the panel that originally heard this appeal, *Torres v. Wisconsin Department*, 838 F.2d 944 (7th Cir. 1988). After parsing the district court's opinion to find errors I think more fanciful than compelling, the majority has sent this matter back. The district court may take additional evidence and then apply a new standard, the outlines of which are quite indistinct.

As a primary point, I share Judge Easterbrook's view, contained in his persuasive dissenting opinion, that the *employer* must establish the necessity of a BFOQ in order to avoid Title VII's strictures against employment discrimination. For this case that rule means that the burden of bridging the yawning gaps in our understanding of rehabilitation falls on the state, not the plaintiffs.

To meet its burden here, the state has relied on what could be characterized as a "feminist" theory of rehabilitation. It is argued that men are at the root of many of

these female inmates' difficulties in social adjustment. The presence of men allegedly creates tension and stress in the living areas and men must therefore give up their jobs in those areas. This theory, propounded by the prison warden and supported by the testimony of two other witnesses, is fine in the abstract. It is logically coherent and its recognition of the problems men can cause women in our society is certainly praiseworthy. But the district judge found that the state's support for this theory, as applied to the rehabilitation of female prison inmates, was woefully inadequate to meet the demanding BFOQ standard. Under *Dothard v. Rawlinson*, 433 U.S. 321 (1977), to justify discriminatory employment practices employers, public no less than private, must show that these practices are "necessary to safe and efficient job performance." *Id.* at 332 n.14. The record here contained, in opposition to the state's position, testimony from plaintiffs' expert Dr. Frederick Fosdale, who opined that the presence of males in the living quarters was valuable to inmates' eventual ability to adjust to the outside world. Tr. 6 at 14-15. Dr. David Kalinich, another expert for the plaintiffs, testified that TCI's BFOQ plan had not enhanced any rehabilitative efforts. Tr. 7 at 6. The plaintiffs also called Robert E. Ellsworth, a former Director of Wisconsin's Bureau of Adult Institutions, who testified that employing staff of both genders can have a beneficial effect on the treatment of inmates, provided privacy concerns are met. Tr. 6 at 64. The record also contained one meager bit of quantitative evidence: Superintendent Switala's concession that TCI's recidivism rate had not declined since the gender-based restrictions had been imposed. Tr. 10 at 177-82; *see* 639 F. Supp. 271, 280 (E.D.

Wis. 1986). Concededly, the period over which potential improvements were measured was short and trends in recidivism rates may not reflect all of an institutions improvements in "enhancing the individual's potential for personal achievement." Slip op. at 17 n.4. But the burden here, a heavy one, was on the state to show that gender discrimination was necessary, not on the guards to show that gender neutrality was harmless.

Also significant, in my view, is what the record did not contain. If the presence of men in the living units was as stressful and disruptive as the state claims, one would thing that specific, concrete evidence of negative inmate reactions would have been available. There was none of this. The only evidence presented in this vein was Superintendent Switala's general description of complaints received from inmates. Tr. 9 at 83-85. This gaping void in the evidence is perhaps what Chief Judge Warren had in mind when he commented upon the state's lack of "objective evidence."

The majority finds conclusive evidence of legal error in the district court's statement that the defendants "offered no objective evidence, either from empirical studies or otherwise" in support of their rehabilitation theory. 639 F. Supp. at 280. According to the majority, this statement demonstrates that Judge Warren's legal standard was "unrealistic" and "unfair." Slip op. at 17. I think the majority makes far too much of an isolated comment in a detailed and thoughtful opinion. Perhaps the district judge should have stressed his recognition that expert testimony is competent in this kind of case. I do not believe that Judge Warren's language, which is juxtaposed with

a summary of the contradictory expert testimony of the defendants' and plaintiffs' experts, even remotely establishes that the district judge carried the skepticism required in assessments of BFOQ claims to an extreme.

The majority claims that the plaintiffs' evidence does not prove to its satisfaction that Superintendent Switala's decision to establish the BFOQ was not "the product of a reasoned decision-making process, based on available information and experience." Slip op. at 18. This approach to formulating a standard cannot, of course, be reconciled with *Dothard*. Further, the majority's assumption that there are decisive differences in the rehabilitation of men and women convicts runs totally counter to Title VII's mandate to view such assumptions with suspicion. Although it eschews any bold statement, the majority opinion amounts to a prison exception to the generally applicable BFOQ standard. We are told that prison officials, particularly prison officials who answer to legislatures that believe, at least in theory, in attempting to rehabilitate inmates, face "intractable problems" which they must address under conditions of radical uncertainty. To have any hope of accomplishing their daunting task to these prison administrators must have the latitude to innovate in ways that violate otherwise applicable strictures against employment discrimination. Courts must therefore recognize this experimental license as a necessary element of prison administration in BFOQ cases.

To confine this special treatment to prisons, however, we would have to rely more on edict than on principle. Society asks many public institutions to attack seemingly intractable problems in areas beset by uncertainty. The

jobs of maintaining law and order and providing adequate health care and effective education, particularly in our poorest neighborhoods, come immediately to mind. In constitutional cases, one source of the majority's special deference to prison administrators, the Supreme Court has recognized that the special demands placed on public school administrators, like the demands placed on prison administrators, necessitate special leeway. *See, e.g., Hazelwood School Dist. v. Kuhlmeier*, 108 S. Ct. 562 (1988); *New Jersey v. T.L.O.*, 469 U.S. 325 (1985). I doubt that the majority would be prepared to permit school administrators to adopt BFOQs involving race, gender, religion or age based solely on a showing that the discriminatory measures were "innovative" and adopted in good faith in the face of intractable educational problems and pedagogic uncertainty. I do not doubt, however, that reversal in this case has far more to do with the majority's disagreement with Judge Warren's weighing of the evidence than with any particularly compelling need for prison administrators to innovate in ways that violate strictures against employment discrimination.

Even with its newly crafted experimental license doctrine, the majority's determination to reverse necessitates some energetic massaging of the plaintiffs' evidence. Apart from the recidivism numbers, which the majority feels safe in disregarding due to the short time period they cover and the presumed shortcomings of recidivism as a measure of rehabilitation, there is the testimony of Fosdale and Kalinich. The majority finds this evidence wanting because Kalinich's work had primarily involved male prisons— though he also had done consulting and administrative work involving female prisons, *see* tr. 6 at 140-41—and

because both expressed skepticism about the prospect for rehabilitation in general. Ordinarily, we leave assessments of the persuasiveness of expert testimony to district courts. *Anderson v. City of Bessemer City*, 470 U.S. 564 (1985), requires us to apply the deferential clearly erroneous standard of review to district court factual determinations—even to factual determinations based on physical or documentary evidence, which would appear to present a weaker case for deference than the assessment of testimony at issue here. *Id.* at 573-76. Moreover, this circuit has long held that assessments of expert testimony are no different from other factual determinations in this respect. *See, e.g., George R. Churchill Co. v. American Buff Co.*, 365 F.2d 129, 130 (7th Cir. 1966). I would have thought that such matters as determining the boundaries and transferability of Kalinich's expertise (a point on which the district judge expressly ruled, *see* tr. 6 at 143) and deciding how Fosdale's and Kalinich's general doubts about the possibilities of rehabilitation affected their credibility on the question at hand were part of the fact-finder's function.

Finally, the majority suggests that a "common-sense understanding of penal conditions," as well as deference to prison administrators, supports its rejection of the trial judge's evaluation of the evidence. Slip op. at 15. The conventional view is that common sense in a particular field, though perhaps partly innate, develops through exposure to events and experiences. Ordinarily, we assume that the comparative advantage on matters of common sense rests with district judges. In this particular instance, the rule of thumb seems especially apt. Judge Warren

has served as district attorney of one of Wisconsin's larger urban counties and as Attorney General of the state for a number of years. He has certainly had considerable exposure to penological practice and to penological theory. His experience has endowed him with an uncommon amount of common sense. I do not believe it is necessary to seek new evidence and pursue a new analysis of the matters he has ably addressed.

I therefore respectfully dissent.

EASTERBROOK, *Circuit Judge*, dissenting. States should have latitude to experiment in their handling of prisoners. No one has found a satisfactory way to deal with offenders, and only an exceptionally strong reason should induce courts to interfere with the search. Courts should accept reasonable judgments by state officials in the ordinary course of prison management. The security and privacy concerns of prison life should cause judges to doubt that making prisons more like civilian life is wise. Female guards may make Taycheedah both a more humane place for its inmates and a more secure place in which to confine them. The judges in the majority deploy these contentions in reversing the district court.

If this were a suit directly under the fourteenth amendment, the state would receive the benefit of these observations. E.g., *Turner v. Safley*, 107 S. Ct. 2254, 2259-62 (1987); *O'Lone v. Shabazz*, 107 S. Ct. 2400, 2404-05 (1987). It is not, so the state does not. This suit invokes Title VII of the Civil Rights Act of 1964. Exercising its power under § 5 of the fourteenth amendment, Congress altered the usual burdens. *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976); cf. *Katzenbach v. Morgan*, 384 U.S. 641 (1966).

The employer in a Title VII suit must show that its use of gender as a ground of decision is not only reasonably related to legitimate objectives (the constitutional inquiry) but also "necessary". *Dothard v. Rawlinson*, 433 U.S. 321 (1977). The employer's burden is less onerous when the plaintiff protects the disparate consequences of a policy that is neutral with respect to sex, see *Watson v. Ft. Worth Bank & Trust*, 108 S. Ct. 2777, 2787-91 (1988) (plurality opinion), but Wisconsin uses gender as an explicit ground of decision and so must satisfy the most exacting standard. The statute grants rights to employees, not to employers. The district court held a trial and concluded that the state's evidence did not satisfy its burden.

The allocation of the burden makes all the difference when uncertainty predominates—a fair description of arguments pro and con about the operation of prisons. Do the privacy cards protect privacy at the expense of security? Surely yes, but equally surely the sacrifice is not great. Taycheedah retained its privacy cards even after banishing men from the corridors. No one knows the extent of the cards' effects, so we must accept the district court's view of the subject. *Anderson v. Bessemer City*, 470 U.S. 564 (1985). Women's prisons throughout the nation employ male guards; other women's prisons in Wisconsin do so; four other courts of appeals have held that unless prisons entail grave risks of violence to members of one sex only, as in *Dothard*, sex is not a bona fide occupational qualification for the position of prison guard, see *Harden v. Dayton Human Rehabilitation Center*, 779 F.2d 50 (6th Cir. 1985), affirming 520 F. Supp. 769 (S.D. Ohio 1981); *Hardin v. Stynchcomb*, 691 F.2d 1364 (11th Cir. 1982); *Forts v. Ward*, 621 F.2d 1210 (2d Cir. 1980);

Gunther v. Iowa State Men's Reformatory, 612 F.2d 1079 (8th Cir. 1980).

Do the male guards hinder rehabilitation of the female prisoners? Maybe, but the expert testimony in the case conflicts, which mirrors the conflict in society at large about rehabilitation. Some use this word to refer to restoring (or creating) a sense of normal social interactions, including respect for privacy. One expert testified along these lines that male guards hinder rehabilitation by reminding the prisoners of their past, often unhappy, encounters with men; another expert testified that male guards promote rehabilitation because their presence reflects a part of reality to which prisoners must be accustomed if they are to function normally after release. Who is right? When the burden is on the defendants, and the trier of fact has found the defendants' explanations shallow, an appellate court must accept that decision. We ought not take it as indisputable that women are different from men and use that premise to justify sex differences in employment. Congress thought otherwise; the district court found otherwise. Under the court's treatment of "necessity" a district judge may (perhaps is compelled to) accept an employer's bare opinion that segregation by sex is helpful. Rarely are we so deferential even in litigation filed by prisoners directly under the Constitution, the source of the "deference" cases to which the court refers, see slip op. 9, 11-12. *Dothard* held that a level of violence (including sexual violence) exceptional for American prisons supplied a BFOQ; the majority today says that sex may be a BFOQ in every female prison (maybe every prison) in America.

There is another sense of rehabilitation: the ability of a prison to "cure" persons of their criminal habits, measured by the recidivism rate of the former inmates. The rate of crime falls with age, D.P. Farrington, *Age and Crime*, 7 Crime and Justice: An Annual Review of Research 189 (1986), and with the threat of punishment (deterrence), so any prison may "rehabilitate" its inmates by holding them longer. No solid evidence shows that the conditions at a prison affect recidivism. Neither educational programs nor confinement arrangements nor any other measurable attribute seems to reduce the rate of crime after release, holding other things (such as age and personal characteristics) constant. See Lee Sechrest, Susan O. White & Elizabeth D. Brown (eds.), *The Rehabilitation of Criminal Offenders: Problems and Prospects* (1979). "The view that 'nothing works' has . . . become the conventional wisdom among most corrections practitioners and researchers." Peter W. Greenwood, *Controlling the Crime Rate through Imprisonment*, Crime and Public Policy 251, 253 (James Q. Wilson ed. 1983). The evidence in this record suggests that none of the changes in Taycheedah's operation affects the recidivism rate of its inmates. 639 F. Supp. 271, 280 (E.D. Wis. 1986).

The court concludes, slip op. 14-18, that the district judge erred in requiring "objective" (that is, empirical) evidence to support any defense of bona fide occupational qualifications. If the district judge had used such an inflexible standard, he would have been in error. Digital computers are not the only source of facts. Employers often must act on widely held beliefs even if data remain to be collected. When there are no data, when the impressions and judgments of the witnesses conflict—witnesses

for both sides were experienced in studying or managing prisons—the district court is entitled to credit one side's approach over the other's. The district judge did no more than that. He simply pointed to the lack of one kind of evidence as additional support for his conclusion. We review judgments, not opinions; an isolated sentence in a thoughtful opinion is not a sufficient basis on which to reverse a judgment.

The court's opinion masks a deeper question. Why does the need to employ female guards to promote rehabilitation establish the "necessity" of doing so? It cannot be that whenever the employer gets *any* benefit, however small, from using gender as a ground of decision, it is therefore "necessary" to use this criterion. Rehabilitation as a justification for confinement has all but vanished from American penology. The women's prison movement adopted in the last century and abandoned in this one a rehabilitative model of confinement. Nicole Hahn Rafter, *Prisons for Women, 1790-1980*, 5 Crime and Justice: An Annual Review of Research 129, 146-66 (1983). Congress jettisoned the rehabilitative justification for imprisonment when adopting the current criminal code in 1984. The arguments presented by Taycheedah's administrators reflect some persons' attitudes, but they are minority views among legislators and social scientists. To say, as the court does, slip op. 13, that because Wisconsin believes in trying to rehabilitate prisoners, then "rehabilitation, no matter how elusive, must be attempted", is to assign no weight to the interests protected by Title VII. No state may define a trivial—or impossible—objective that requires the use of gender for its achievement and then invoke its objective as justification for the discrimination.

If a state wants to pursue the impossible dream, it may not do so at the expense of race or sex discrimination.

One way or another, the arguments offered by the majority are a plea for a special rule for prisons. My colleagues believe not that the state has demonstrated the necessity of hiring guards by sex, but that the state should have leeway to experiment in the operation of its prisons even though it has not so far established the need to run them in a particular way. Congress might come to this conclusion, but it did not do so in 1972, when it extended Title VII to the states. *Dothard* rejects any argument that states should be treated differently as employers. The Court said:

> . . . [The prison officials] contend that the establishment of the minimum height and weight standards by statute requires that they be given greater deference than is typically given private employer-established job qualifications. The relevant legislative history of the 1972 amendments extending Title VII to the States as employers does not, however, support such a result. Instead, Congress expressly indicated the intent that the same Title VII principles be applied to governmental and private employers alike. . . . Thus for both private and public employers, "[t]he touchstone is business necessity" . . . ; a discriminatory employment practice must be shown to be necessary to safe and efficient job performance to survive a Title VII challenge.

Dothard, 433 U.S. at 331 n.14. *Dothard* was about the qualifications of prison guards. We cannot distinguish a prison guard case on the ground that prison officials should have special latitude to experiment. So Wisconsin does not prevail by establishing that its decision is ration-

ally related to legitimate penological considerations—the standard for the constitutionality of most state action that the majority applies to Taycheedah's policy. A rational basis does not carry the day when the statute demands a "bona fide occupational qualification." See *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 422-23 (1985) (decided under the Age Discrimination in Employment Act, but construing the defense applicable to many anti-discrimination laws).

A jailer's lot is not a happy one. *David K. v. Lane*, 839 F.2d 1265, 1278-80 (7th Cir. 1988) (concurring opinion); *Walker v. Rowe*, 791 F.2d 507 (7th Cir. 1986). (Apologies to W.S. Gilbert.) If the prison takes sex into account in choosing and assigning guards, the rejected applicants will sue under Title VII. If the prison hires guards of both sexes, the prisoners will sue on the ground that being observed and searched by someone of the opposite sex invades privacy. Whether to tighten this vise is a legislative decision, and the statute now in force prefers the interests of guards (as employees) over the interests of prisoners. At all events, the panel's opinion shows that the use of male guards at Taycheedah does not violate the privacy interests of the prisoners, 838 F.2d at 951-53, if they have any that the state is bound to respect after *Hudson v. Palmer*, 468 U.S. 517, 524-30 (1984).

When judges in constitutional litigation defer to prison officials' decisions, this is not because they know the decisions to be right. It is a contradiction in terms to decide which are the best ideas about prison management and then "defer" to their proponents. Prison cases reflect not rhetorical manipulation but genuine deference, based on

a lack of knowledge. Certainly judges lack it; often so does everyone else. When the plaintiff bears the burden of persuasion, ignorance, combined with the judiciary's professional skepticism, implies leaving well enough alone. Uncertainty is not a good reason to remake prisons. They don't need reform; things are bad enough as they are. When information does not permit confident separation of right from wrong, courts cannot mark the "better" path. Only someone with the *answer*, and not just a point of view, may insist that everyone else fall into line. When Congress requires the state to justify its position, uncertainty cuts in favor of plaintiffs. Judges cannot be skeptics in suits under the Constitution and confident that they (or prison officials) have the right answers in suits under Title VII. Even-handed skepticism implies that the party with the burden loses.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 86-2161

RAYMOND J. TORRES, FRANKLIN J. UTZ, and GERALD F. SCHMIT,

Plaintiffs-Appellees,

v.

WISCONSIN DEPARTMENT OF HEALTH & SOCIAL SERVICES, *et al.,*

Defendants-Appellants.

Appeal from the United States District Court
for the Eastern District of Wisconsin.

No. 83 C 629—Robert W. Warren, *Judge.*

Argued December 9, 1986—Decided January 29, 1988

Before CUDAHY and RIPPLE, *Circuit Judges,* and WILL, *Senior District Judge.**

CUDAHY, *Circuit Judge.* The plaintiffs in this suit are three men who are employed as correctional officers at a prison for women. They were demoted pursuant to the creation and implementation of a policy that designated certain correctional officer positions (including

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* The Honorable Hubert L. Will, Senior District Judge for the Northern District of Illinois, is sitting by designation.

those formerly held by the plaintiffs) as open to women only. The plaintiffs sued, challenging this policy as violative of their right to be free from employment discrimination on the basis of sex, as guaranteed by Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1982). The defendants responded that sex is a "bona fide occupational qualification" ("bfoq"), 42 U.S.C. § 2000e-2(e)(1), for the positions at issue because that distinction on the basis of sex is necessary to protect the privacy rights of the inmates and to promote the prison's purposes of security and rehabilitation. The district court found after a bench trial that the defendants had failed to establish that sex was a valid bfoq justifying the defendants' policy. 639 F. Supp. 271 (E.D. Wis. 1986). We affirm.

I.

A.

In reviewing this case on appeal, we are mindful, as always, of the deference we owe to the trial court's findings of fact. Federal Rule of Civil Procedure 52(a) provides that "[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." The Supreme Court recently applied the rule to a Title VII claim in *Anderson v. City of Bessemer City*, 470 U.S. 564 (1985). The Court stated there that "'[a] finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" *Id.* at 573 (quoting *United States v. United States Gypsum Co.*, 333

U.S. 364, 395 (1948)). A reviewing court may not reject a factual finding simply because it disagrees with the trier of fact. *Id.* Further, a reviewing court must show even greater deference to the trial court's findings that involve credibility of witnesses, "for only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said." *Id.* at 575.

Deference to the district court's findings of fact is particularly appropriate in the present case. The district court heard numerous witnesses over the course of an eleven-day trial. Further, the district court conducted a tour of the women's prison involved here and thus was able to view the layout of the facilities and, to some degree, the extent to which the inmates were afforded privacy. 639 F. Supp. at 272. The following summary of the facts is therefore based almost entirely on the district court's recitation of its factual findings, which we have found to be a careful and accurate reflection of the facts of record.[1]

B.

The defendant Taycheedah Correctional Institution ("TCI") is the only women's maximum security prison in Wisconsin. TCI is operated by the Wisconsin Department of Health and Social Services ("DHSS"), which is also a defendant in this action. The final named defen-

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[1] The one possible exception to this is the district court's somewhat unclear description of the prison's policy on the use of privacy cards. *See infra* note 2. Our disposition of this case, however, is not affected by the district court's description of the privacy card policy. *See infra* pp. 11-18.

dant is Nona J. Switala who is the Superintendent of TCI, a position she has held since September 1978.

Prior to 1975, TCI was a prison for women. In 1975, DHSS designated TCI a co-correctional institution and transferred male inmates and male correctional officers to TCI. TCI again became a prison for women only in February 1978 and currently continues to be a women's prison. When the male inmates were transferred out of TCI, however, male correctional officers remained employed at TCI.

TCI includes three buildings in which inmates are regularly housed; each building has three residence floors. The inmates live in single, double and multiple occupancy rooms. Each room contains a bed for each inmate, a desk, chair, light, toilet and wash basin. In two of the three residence buildings, privacy curtains have been installed around the toilets. When an inmate is behind the curtain, only her feet are visible. Privacy curtains will soon be installed in the rooms in the remaining residence building.

The inmates' rooms have solid doors that contain, at eye level, a clear glass window that measures approximately four inches by six inches. During the hours of 6 a.m. to 9 p.m., the inmates are permitted to cover that window from the inside with a piece of cardboard known as a "privacy card" for a maximum of ten minutes while they are using the toilet or changing their clothing. Dur- the hours 9 p.m. to 6 a.m., the privacy card is placed over the window on the outside of the door which enables the correctional officers to lift the card to see into the room in order, for example, to perform body counts. Dur-

ing these nighttime hours, the inmates apparently are not permitted to place the card over the window on the inside of the door for the ten-minute intervals.[2]

The correctional officers perform body counts each day at 7:30 a.m., 12:30 p.m., 5:30 p.m., 9:30 p.m., and once an hour between 10 p.m. and 6 a.m. The inmates are aware of this schedule. The officers perform the counts at night by looking in the windows in the doors to the inmates' rooms. The inmates are provided appropriate sleepwear from TCI but are not required to wear it.

Shower rooms are located on each floor of the residence halls. The doors to the shower rooms are solid; some contain windows, but the windows have been rendered opaque. Each shower room has one to three shower stalls, one to three toilet stalls, and some have one or more

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[2] The district court's finding on this point is ambiguous. The court stated:

> Since before 1975, inmates have been permitted to place small rectangular pieces of cardboard, termed "privacy cards" over the observation windows on the doors during nighttime hours. Since the cards were placed on the outside of the door, and were capable of being lifted sometimes, in 1976 inmates were given permission to cover the observation window with a privacy card on the inside of the room door for up to 10 minutes while dressing or using the toilet. Since 1983 the policy has been that from 9 p.m. to 6 a.m. inmates are permitted to have the privacy cards continuously over the window only on the outside of the door. They may still use the cards on the inside for the 10 minute maximum.

639 F .Supp. at 275. The parties, however, agree on appeal that the present policy at TCI prohibits placing privacy cards over the window on the inside of the door between the hours of 9 p.m. and 6 a.m. See Plaintiffs' Brief at 10; Defendants' Reply Brief at 3.

bathtubs. Each shower and toilet stall has a curtain or door which shields the inmate from view from the rest of the shower room. In all but the maximum security residence hall, only one inmate may occupy the shower room at a time, except that roommates may use the shower room together. Inmates are allowed fifteen minutes in the shower room.

Absent an emergency or rule violation, no correctional officer would see an inmate in any state of undress. In order to use the shower room, an inmate must sign up with the floor officers. The inmate must wear at least a robe or housecoat while traveling to and from the shower room. Correctional officers do not routinely enter the shower rooms while they are occupied.

Correctional officers at TCI perform three types of searches of inmates, all of which are authorized by the Wisconsin Administrative Code. Pat searches are the least intrusive and may be performed at any time, subject to certain restrictions and requirements. The inmate remains fully clothed during a pat search; she empties her pockets and then the searching officer runs his or her hands over the inmate's entire body. Although the Wisconsin Administrative Code provides that correctional officers may perform pat searches on inmates of the opposite sex, there is an unwritten rule at TCI that only female officers may perform pat searches. Strip searches, the second type of search used at TCI, must be authorized by a "lieutenant" and are performed in private, and, except in emergencies, only by officers of the same sex as the inmate. Body cavity searches, the most invasive of the searches, are performed only by medical personnel. Searches of the in-

mates' rooms are performed when the inmates are out of the rooms.

DHSS ranks its correctional officers as follows (in ascending order): correctional officer 1 ("CO-1"), correctional officer 2 ("CO-2") and correctional officer 3 ("CO-3"). TCI employs officers from all three classifications in its living units. The CO-3 in charge of a living unit is known as a "sergeant."

Prior to the implementation in 1980 of the plan that designated specified positions as available only to women, all correctional officer positions were open to all qualified officers without any restrictions based on sex. In August 1978, DHSS authorized correctional institution superintendents to submit requests for restricting certain correctional officer positions to women only where those positions involved performing strip searches or supervising the showers or living units. TCI's then-acting superintendent responded by proposing that five positions, including one CO-3 post, be limited to female officers. This plan was never formally adopted.

In June 1980, DHSS approved a different plan (the "Plan") which was based on a proposal by defendant TCI superintendent Switala. The Plan provided that nineteen of the twenty-seven correctional officer posts in the residence halls would be limited to women. This number included all of the CO-3 posts in the residence halls as well as all CO-1 and CO-2 "single coverage" posts, that is, posts where only one officer was assigned to a floor. Beginning on September 1, 1980, all vacancies for these posts were to be filled with female officers. If any of these posts were still held by men as of September 1, 1982, the male

officers were to be replaced by female officers. With the full implementation of the Plan, fifteen of the eighteen CO-3 positions at TCI were restricted to women.

The three plaintiffs were all employed by TCI as CO-3's prior to the full implementation of the Plan. Pursuant to the Plan, the plaintiffs were removed from their CO-3 posts and involuntarily demoted to the rank of CO-2. They are presently working under female CO-3's who have less seniority and less experience than the plaintiffs.

The defendants do not dispute that the plaintiffs were qualified CO-3's and that they were performing their duties satisfactorily at the time of their demotion. Moreover, the Plan was not adopted for the purpose of addressing specific allegations of violations of the privacy of inmates by male officers. Rather, the plan was adopted because administrators at TCI were experiencing increased difficulty in assigning posts and shifts "that would recognize seniority, officer's personal desires, institutional requirements, and still have enough female CO's present at all shifts to insure what the institution felt was necessary for inmate privacy." 639 F. Supp. at 276.

None of the other six adult correctional institutions operated by the State of Wisconsin, including the Women's Correctional Center in Milwaukee, restricts any of its correctional officer positions to one sex. Female correctional officers employed at male prisons in Wisconsin testified at trial that they perform pat searches on male inmates,

routinely inspect the showers and toilet areas and often see male inmates partially or completely undressed.[3]

II.

In defense of the Plan's overt discrimination on the basis of sex, the defendants claim that sex is a "bona fide occupational qualification," as that term is used in section 703(e) of Title VII, for the positions identified in the Plan. Section 703(e) of Title VII authorizes sex-based

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[3] As a preliminary manner, the defendants argue that two of the plaintiffs, Utz and Schmit, failed to file a timely complaint with the Equal Employment Opportunity Commission. The defendants contend that the plaintiffs were notified of the existence of the Plan in 1980, but did not file charges until after their demotions, pursuant to the full implementation of the Plan, in September 1982. We agree with the district court that the relevant discriminatory act was the Plan's implementation and the plaintiffs' resulting demotions in 1982. The plaintiffs' status at TCI was not directly affected by the mere adoption of the Plan in 1980, nor were their future demotions assured at that time. *But, cf. Lorance v. AT&T Technologies, Inc.*, 827 F.2d 163, 167 (7th Cir. 1987) (statute of limitations triggered by employee's subjection to discriminatory scheme in "narrow" set of cases involving "facially-neutral but discriminatory seniority system[s]").

We also agree with the district court's characterization of the Plan as a continuing violation. This circuit has described a continuing violation as one "in which the employer's express, openly espoused policy [is] alleged to be discriminatory" and "was applicable to the plaintiff at the time the discrimination charge was filed." *Stewart v. CPC Int'l, Inc.*, 679 F.2d 117, 121 (7th Cir. 1982) (discussing *Bartness v. Drewrys U.S.A., Inc.*, 444 F.2d 1186 (7th Cir.), *cert. denied*, 404 U.S. 939 (1971)). This case does not involve merely a one-time act of demoting Utz and Schmit. Rather, TCI's openly discriminatory policy remained in effect subsequent to the demotions and continued to exclude all male correctional officers, including the plaintiffs, from the positions covered by the Plan. For these reasons, we find that the suits filed by Utz and Schmit were not time barred.

discrimination "in those certain instances where . . . sex . . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." 42 U.S.C. § 2000e-2(e)(1). The Supreme Court has stated that the bfoq exception is "an extremely narrow exception to the general prohibition of discrimination on the basis of sex." *Dothard v. Rawlinson*, 433 U.S. 321, 334 (1977). In support of this "extremely narrow" standard, the Court cited the legislative history of Title VII, the consistent interpretation of the provision by the Equal Employment Opportunity Commission, and the restrictive language of section 703(e) itself. *Id.*

The Court also quoted approvingly from two cases from the Fifth Circuit that formulated very demanding tests for a valid bfoq defense. In *Diaz v. Pan American World Airways*, 442 F.2d 385, 388 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971), the court held that "discrimination based on sex is valid only when the *essence* of the business operation would be undermined by not hiring members of one sex exclusively." *Quoted in Dothard*, 433 U.S. at 333 (emphasis in original). The same court held in an earlier opinion that an employer could present a successful bfoq defense only by proving "that he had reasonable cause to believe, that is, a factual basis for believing, that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved." *Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F.2d 228, 235 (5th Cir. 1969), *quoted in Dothard*, 433 U.S. at 333. Thus, a defendant bears a heavy burden in attempting to establish a bfoq defense. He or she clearly may not justify a refusal to hire members of one sex merely by

pointing to stereotypes about differences between women and men. *Dothard*, 433 U.S. at 333.[4]

A.

The state defendants argue that the essence of TCI's business does require that only women be hired for the positions in question. This sex-based discrimination is necessary, according to the defendant, to preserve prison security, protect the privacy interests of the inmates and promote rehabilitation of the inmates. In support of its argument that prison security may provide the basis for a bfoq defense, the defendants cite the Supreme Court's

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[4] The defendants argue that this court should defer to the prison administrators' determination that the Plan was necessary. Although we show deference to the expertise of prison authorities in the management of prisons in some contexts, *see, e.g., Rhodes v. Chapman*, 452 U.S. 337, 351 n.16 (1981), where the issue is employment discrimination, the claims of prison authorities about the needs of the institution must satisfy the same burdens of proof as are imposed on any employer attempting to meet the "extremely narrow" bfoq exception to Title VII. *Dothard* itself, in which the Supreme Court set forth general standards to be applied when evaluating a bfoq defense, involved a challenge to a state regulation that excluded women from employment in some state prison positions. Yet the Court did not include as part of its analysis a showing of deference to the prison authorities' determinations concerning the exclusion of women from the positions at issue. In fact, in considering a related claim, the Court rejected the state defendants' argument that because a challenged policy was enacted by statute, the policy was entitled to greater deference than policies implemented by private employers. The Court noted that "Congress expressly indicated the intent that the same Title VII principles be applied to governmental and private employers alike." *Dothard*, 433 U.S. at 332. Further, other federal courts that have reviewed sex-based restrictions on prison employment have not shown deference to determinations made by prison authorities about the need for those restrictions. *See* cases cited *infra* p. 17.

opinion in *Dothard*, 433 U.S. 321. The Court in *Dothard* upheld a regulation that explicitly excluded women from certain jobs in Alabama's penitentiaries for men, finding that "[t]he employee's very womanhood would . . . directly undermine her capacity to provide the security that is the essence of a correctional counselor's responsibility." *Id.* at 336. Yet the Court based that finding on the fact that Alabama's penitentiaries were "not typical," *id.* at 336 n.23, and were "peculiarly inhospitable . . . for human beings of whatever sex," *id.* at 334. A federal district court had found conditions in Alabama's prisons to be "constitutionally intolerable" and characterized by "rampant violence" and a "jungle atmosphere." *Id.* A substantial percentage of the inmates were sex offenders who were scattered throughout the prison population. The Court believed that, given these extreme circumstances, there was a real risk that male inmates would physically assault female correctional officers, which would jeopardize the security of the entire prison. *Id.* at 335-36.

The defendants' prison security justification for the Plan bears no resemblance to that accepted in *Dothard*. They do not argue that the conditions in TCI are particularly violent and that female inmates convicted of sex offenses were likely to assault male correctional officers, as a result of their "very manhood." Rather, their security rationale is actually inextricably connected with their privacy rationale. According to the defendants, if they were to employ male correctional officers for the positions at issue and continue to operate TCI in a manner necessary to preserve prison security, they inevitably would seriously interfere with the privacy interests of the inmates. Because the defendants have no distinct security justifica-

tion for the claimed bfoq, we will consider their discussion of the needs of prison security in the context of our evaluation of their privacy argument.

B.

When presented with a claim, such as the present one, that the right of members of one sex to equal employment conflicts with the privacy interests of members of the opposite sex, a court faces difficult questions, the resolution of which may require sacrificing one of these important interests. The court must consider at what point the threat of an infringement of privacy interests meets the requirements of a bfoq defense and thus justifies excluding members of one sex from an employment opportunity. This question involves several further inquiries. How likely must the privacy infringement be? How severe must the potential intrusion be? Must it rise to the level of a constitutional violation? Is it significant that preferences for privacy from members of the opposite sex may be entirely culturally created, and that by recognizing such preferences the courts may encourage sex differences at the expense of equality in employment? On the other side of the scale, how severely will the alleged bfoq compromise the right to equal employment?

Courts confronted with these issues have reached conclusions that have varied from one extreme to the other. A federal district court in Arkansas held that a hospital could exclude male nurses from the labor and delivery section of its obstetrics and gynecology department in order to protect the privacy rights of its patients. *Backus v. Baptist Medical Center*, 510 F. Supp. 1191 (E.D. Ark. 1981), *vacated as moot*, 671 F.2d 1100 (8th Cir. 1982). Ac-

cording to the court, sex was a valid bfoq because the hospital would violate the patients' constitutional rights to privacy if it allowed male nurses to fill these positions. Expressing a similar view, a district court in Michigan held that state mental health care institutions could rely on the privacy rights of their patients to justify a sex bfoq for positions involving patient care, stating:

> Obviously most people would find it a greater intrusion of their dignity and privacy to have their naked bodies viewed (or any number of personal services performed) by a member of the opposite sex. Although there will be a certain relinquishment of privacy by necessity when anyone is admitted to a hospital or mental health facility, this is not to say that a patient has forfeited all rights to privacy.

Local 567 Amer. Fed'n of State, County & Mun. Employees v. Michigan Council 25, Amer. Fed'n of State, County & Mun. Employees, 635 F. Supp. 1010, 1013-14 (E.D. Mich. 1986) (footnote omitted).

A district court in Oregon took a very different view. The court held that the state could not exclude female correctional officers from positions that involved both performing "pat-down" frisk searches of clothed male inmates (including their anal-genital areas) and visual observations of male inmates in various states of undress. *Bagley v. Watson*, 579 F. Supp. 1099 (D. Or. 1983). The court relied on the reasoning expressed by Justice Marshall in the following quote from his dissent in *Dothard*, 433 U.S. at 346 n.5:

> [I]f women guards behave in a professional manner at all times, they will engender reciprocal respect from inmates, who will recognize that their privacy

> is being invaded no more than if a woman doctor examines them. The suggestion implicit in the privacy argument that such behavior is unlikely on either side is an insult to the professionalism of guards and the dignity of inmates.

Quoted in Bagley, 579 F. Supp. at 1104; *see also Griffin v. Michigan Dep't of Corrections,* 654 F. Supp. 690, 702-03 (E.D. Mich. 1982).

The present case is further complicated by the fact that those asserting infringements of their privacy are prisoners. The Supreme Court has repeatedly held that prison inmates retain certain constitutional rights after their conviction and incarceration. *See, e.g., Bell v. Wolfish,* 441 U.S. 520, 545 (1979) (citing cases). Yet the Court has also held that these rights are not absolute, but are subject to restrictions and limitations imposed to further legitimate institutional goals and policies. *Id.* at 545-48. "Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." *Price v. Johnston,* 334 U.S. 266, 285 (1948), *quoted in Bell,* 441 U.S. at 545-46. Thus, in *Bell,* the Court held that requiring inmates to submit to visual body cavity searches after every contact visit with a person from outside the institution did not violate the fourth amendment. This circuit has held that "[o]ne of the most important rights which is necessarily limited as a result of one's incarceration is the right to be free of unwarranted intrusions into one's personal privacy." *Smith v. Fairman,* 678 F.2d 52, 54 (7th Cir. 1982) (male inmates' constitutional right to privacy not violated by performance of frisk searches, excluding genital area, by female correctional officers), *cert.*

denied, 461 U.S. 907 (1983). Nevertheless, inmates do retain some constitutional right to privacy. The First Circuit has recently held that "a body-cavity search of female inmates conducted by police officers, involving touching, conducted in a non-hygienic manner and in the presence of male officers, was a clearly established violation of the inmates' fourth amendment right to be free from an unreasonable search." *Bonitz v. Fair*, 804 F.2d 164, 173 (1st Cir. 1986) (footnote omitted).

The plaintiffs respond to the state's privacy concerns by arguing that the inmates at TCI have no constitutional right of privacy that can justify the Plan. Implicit in this argument is the view that a bfoq cannot be upheld in this case absent a violation of the inmates' constitutional right to privacy. We recognize that some courts in analogous cases have looked to whether the privacy infringement rose to the level of a constitutional violation. *See, e.g., Backus*, 510 F. Supp. 1191. We need not, however, define here precisely at what point the privacy interest of inmates would justify a sex bfoq for correctional officers. The present case is not a close one that would require us to resolve the difficult questions discussed above. TCI is currently operated in a way that is very sensitive to the privacy interests of its inmates and affords them a good deal of privacy from correctional officers of both sexes. The defendants have not met their burden of proving the existence of a serious conflict between the privacy interests of the inmates and the employment rights of the correctional officers, nor have they shown that any conflict that does exist cannot be remedied through means short of a restriction based on sex.

The Second, Eighth and Eleventh Circuits, as well as several federal district courts, have considered attempts

by states to restrict correctional officer and similar positions in prisons to the same sex as that of the inmates; in each of these cases, the court held that the privacy interests of the inmates did not justify a sex bfoq for the position(s) involved. *See Hardin v. Stynchcomb*, 691 F.2d 1364 (11th Cir. 1982); *Forts v. Ward*, 621 F.2d 1210 (2d Cir. 1980); *Gunther v. Iowa State Men's Reformatory*, 612 F.2d 1079 (8th Cir.), *cert. denied*, 446 U.S. 966 (1980); *Edwards v. Department of Corrections*, 615 F. Supp. 804 (M.D. Ala. 1985); *Bagley v. Watson*, 579 F. Supp. 1099 (D. Or. 1983); *Griffin v. Michigan Dep't of Corrections*, 654 F. Supp. 690 (E.D. Mich. 1982); *Harden v. Dayton Human Rehabilitation Center*, 520 F. Supp. 769 (S.D. Ohio 1981), *aff'd*, 779 F.2d 50 (6th Cir. 1985).[5] In addition to the requirements described in *Dothard*, 433 U.S. 321, *Diaz*, 442 F.2d 385, and *Weeks*, 408 F.2d 228, *see supra* pp. 8-9, defendants in such suits "bear the burden of proving that because of the nature of the operation of the business they could not rearrange job responsibilities in a way that would eliminate the clash between the privacy interests of the inmates and the employment opportunities of female deputy sheriffs [or correctional officers]." *Hardin*, 691 F.2d at 1370-71; *see Gunther*, 612 F.2d at 1086; *Edwards*, 615 F. Supp. at 808-09; *Griffin*, 654 F. Supp. 704-05; *Harden*, 520 F. Supp. at 779; *see also Norwood v. Dale Maintenance Sys., Inc.*, 590 F. Supp. 1410,

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[5] Although this Title VII suit was brought by male correctional officers, we note that sex-based discrimination in prison employment generally operates to exclude women from prison employment opportunities. *See, e.g., Dothard*, 433 U.S. 321; *Hardin*, 691 F.2d 1364; *Forts*, 621 F.2d 1210; *Gunther*, 612 F.2d 1079; *Bagley*, 579 F. Supp. 1099; *Griffin*, 654 F. Supp. 690; *Harden*, 520 F. Supp. 769.

1415 (N.D. Ill. 1984) ("When privacy considerations of clients or guests serve as a reason for hiring only members of one sex, however, the defendant must also prove that no reasonable alternatives exist to its gender-based hiring policy."). "Resolution of such cases requires a careful inquiry as to whether the competing interests can be satisfactorily accommodated before deciding whether one interest must be vindicated to the detriment of the other." *Forts*, 621 F.2d at 1212.

A review of these analogous cases reveals that a prison can usually preserve the privacy interests of its inmates without sacrificing the right of correctional officers to equal employment opportunities; thus, a bfoq is rarely justified.[6] The rationale for the claimed bfoq's that was

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[6] The defendants cite several cases that have held that a bfoq was justified by privacy concerns in the prison context. *See Hudson v. Goodlander*, 494 F. Supp. 890 (D. Md. 1980); *Reynolds v. Wise*, 375 F. Supp. 145 (N.D. Tex. 1973); *In re Long*, 127 Cal. Rptr. 732 (Ct. App.), *hearing granted, dismissed as moot*, 55 Cal. App. 3d 798 (1976). These cases, however, did not recognize that the defendants in such a suit bear the burden of proving that alternatives with a less discriminatory effect were unavailable. Because we find that these courts did not apply the appropriate standard for the "extremely narrow" bfoq exception, we decline to follow these cases to the extent that they are inconsistent with this opinion.

Even if we found the legal analysis in these cases to be persuasive, at least two of these three cases are factually distinguishable from the present one and therefore do not affect our disposition here. In *Hudson*, the court found the inmates' rights were violated "by the assignment of female guards to posts where they could view [them] while [they were] completely or entirely unclothed." 494 F. Supp. at 893. The court in *In re Long* found that the male inmates were forced to "undress, bathe, void [and] excrete" in the presence of female guards. 127 Cal. Rptr. at 737. In the present case, no correctional officers of either sex regularly view the inmates while they are undressed or using the shower or toilets.

most frequently offered in these cases was that the duties of the correctional officer positions at issue included performing strip searches and observing inmates while they were using the showers and toilets. These courts rejected this justification as inadequate and found that the prisons had not met their burden of proving that alternatives with less discriminatory impact were unavailable. For example, a prison could reassign duties involving strip searches and shower and toilet surveillance so that, other than in emergencies, these duties would be performed by officers of the same sex as the inmates. *See Hardin*, 691 F.2d at 1373; *Forts*, 621 F.2d at 1216; *Gunther*, 612 F.2d at 1087; *Edwards*, 615 F. Supp. at 809-10; *Harden*, 520 F. Supp. at 779-80. In addition, a prison could install shower curtains that permit only enough visibility to allow the correctional officer to ascertain that the shower was occupied. *See Forts*, 621 F.2d at 1216. Absent countervailing security problems, a prison could afford inmates privacy when dressing or using a toilet in their cells by permitting them to cover the window on their cell doors while engaging in these activities. *See id.* Finally, a prison could provide inmates with suitable sleepwear to avoid inadvertent exposure of their bodies while sleeping. *See id.* at 1217.

Significantly, most of the alternatives to bfoq's suggested by other courts have already been implemented at TCI. Strip searches may be performed only by correctional officers of the same sex as the inmate, except in an emergency. The doors to the shower rooms are solid, and each shower and toilet stall within the shower rooms has its own door or curtain. Correctional officers do not routinely enter a shower room while it is occupied by an

inmate. Inmates must be clothed when walking between their rooms and the shower room.

The toilets in the inmates' rooms in two of the three residence halls at TCI have privacy curtains, and TCI plans to install curtains around the toilets in the third residence hall. The inmates are permitted to cover the windows in the doors to their rooms with "privacy cards" for up to ten minutes between the hours of 6 a.m. and 9 p.m. while they are dressing or using the toilet. TCI provides the inmates with suitable sleepwear.

In addition, for at least four years prior to the full implementation of the Plan, male correctional officers had successfully held the CO-3 positions now limited to women by the Plan. *See Edwards*, 615 F. Supp. at 809 ("What stands out most about the Department's contention here that femaleness is a bfoq for the position of shift commander at [Alabama's prison for women] is that Edwards [the male plaintiff] held this position for nearly a year without any apparent difficulty."). The defendants have offered no evidence that the privacy interests of TCI's inmates were in any way compromised during that time. *See Harden*, 520 F. Supp. at 779 ("[T]he Court is unconvinced that *speculation* about potential privacy violations creates a basis in fact for the issuance of an occupational qualification such as the one herein.") (emphasis in original).

The district court found that, given the procedures followed within the housing units at TCI, "correctional officers, both male and female, would never see an unclothed inmate except during an emergency or where the inmate voluntarily displays her unclothed self or fails to avail herself of the procedures designed to protect her privacy."

639 F. Supp. at 281. The court therefore concluded that "the system in place at TCI sufficiently protects the inmates' privacy rights without the need for a BFOQ plan." *Id.* The only possible exception to this finding by the district court is that an inmate in the residence hall which does not yet contain privacy curtains might have no private space during the hours of 9 p.m. to 6 a.m. if, in fact, TCI does not permit the use of privacy cards during those hours. The defendants, however, have not met their burden of proving that this possibility justifies the Plan. Obvious alternatives to a bfoq exist, namely, installing privacy curtains in the third residence hall (which the defendants have agreed to do) or allowing inmates to use the privacy cards during the night as they do during the day (which the defendants have not proven to be an unacceptable alternative). *See Forts*, 621 F.2d at 1216.

C.

The defendants' third and final rationale for the Plan is that restricting the CO-3 positions in the living units to women furthers the rehabilitation needs of the inmates. They argue that "normalization" of the prison environment is desirable and necessary for rehabilitation to take place and that "such normalization cannot be rationally furthered by subjecting inmates in the showers or toilets to scrutiny by the opposite gender officers." Defendants' Brief at 18. The defendants also claim that among female inmates there has been a history of a "high incidence of physical, sexual, and psychological abuse and domination by men." This pattern of male domination, according to the defendants, would be reinforced by allowing male correctional officers to work in the living units, which in turn

would be "destructive to a female inmate's development of an independent self-image." *Id.* at 20-21.

The defendants have not proven the asserted factual bases for their rehabilitation rationale. The district court found, and we have found no basis in the record for disagreeing, that correctional officers at TCI do not and need not view inmates in the showers or toilets or in any state of undress, absent an emergency. Further, the defendants have not shown that female inmates assigned to TCI have experienced more severe abuse and domination by men than have women in our society as a whole. The defendants' own expert witness, psychologist Dr. Henry Musk, testified that "the rate of abuse, physical or sexual of women in the general population apparently is about the same of women in prison." Trial transcript, Volume 10, at 76 (Aug. 6, 1985).

Defendants did represent that many female inmates have been unusually scarred by male abuse and that the peculiar power relationship between male guards and female prisoners makes male guards an obstacle to rehabilitation. *E.g.*, Trial transcript, Volume 10, at 33-37 (Aug. 6, 1985) (testimony of Joanne M. Brown). If demonstrated, this proposition might justify excluding males from the staff even if female inmates have not suffered unusually severe male abuse. The district court, however, found:

> Defendants offered only a *theory* of rehabilitation as a justification for the BFOQ Plan. They offered no objective evidence, either from empirical studies or otherwise, displaying the validity of their theory. Indeed, Superintendent Switala testified that there had been no change in the recidivism rate at TCI

> from 1980 to the present. The Court refuses to find the Plan valid based strictly on the unproven rehabilitation theory presented by defendants at trial.

639 F. Supp. at 280 (emphasis in original). The court also noted that the plaintiffs had presented expert testimony that directly contradicted the defendants' theory; the plaintiffs' experts testified that the presence of male correctional officers in the living units would contribute to the normalization of the prison environment and therefore have a beneficial effect on inmate rehabilitation. *E.g.*, Trial transcript, Volume 6, at 14-15 (July 30, 1985) (testimony of Dr. Frederick Forsdal). We agree with the district court that the defendants have not met their heavy burden of proving that their rehabilitation theory satisfied the requirements of the very narrow bfoq exception to Title VII.

III.

In upholding the district court's judgment for the plaintiffs in this Title VII claim, we are not holding that a state could never establish a valid sex bfoq for a correctional officer position in a women's prison. Specifically, we do not hold that the state would have to dispel all reasonable doubts about its theory of female inmate rehabilitation before it could exclude male correctional officers. It is even conceivable that the rehabilitation theories and privacy concerns asserted by the defendants in the present case could be shown to justify the Plan instituted by the

state.[7] The defendants, however, did not prove this to the satisfaction of Judge Warren. Because his findings are supported by the evidence and are not clearly erroneous, the district court's judgment is

AFFIRMED.

RIPPLE, *Circuit Judge,* dissenting. The majority emphasizes the characterization of this case that permits it to affirm the district court most easily. When viewed solely as a conflict between the plaintiffs' rights under Title VII and the inmates' constitutional right to privacy, affirming the district court becomes a relatively straightforward matter. An inmate's constitutional rights to privacy are necessarily limited and an employee's rights under Title VII are statutorily broad.

There is, however, another consideration, deemphasized by the majority, that makes this case far more difficult and, in my view, renders erroneous the majority's disposition. This case is much more than a conflict between the rights of inmates and those of their guards. It also presents a serious conflict between the employees' important rights under Title VII and the important right of a prison administrator to seek new solutions to a grave problem that, up to now, has defied solution.

A key issue at trial was the defendants' contention that male guards in a female prison unavoidably hamper

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[7] The dissent argues with some force that the state should be allowed to experiment in its efforts to achieve greater rehabilitation. An experiment that infringes on workers' Title VII protections against discrimination based on gender, however, should not be permitted to go forward without some preliminary showing that it is likely to achieve objectives beyond the testing of a theory.

the state's efforts at rehabilitating the inmates.[1] The record indicates that at least 60 percent of the prisoners at TCI had been physically and sexually abused in their lives by males. For that reason, an experienced and well-educated prison superintendent made a calculated and reasoned decision that using female guards might help the prisoners overcome the negative self-image that resulted from such abuse. Regardless of the precautions taken to prevent the male guards from invading the women inmates' privacy the administrator believed that rehabilitation efforts were thwarted by the male guards' mere presence. At trial, she testified:

> A good many—about 60 percent of our population comes from abusive backgrounds, either . . . at the hands of their parents or spouse or boyfriend or whatever[.] [T]hey come into the institution and they have told me of their fear of assault, their fear of physical harm from inmates, and I believe that if a woman is afraid, that is going to take over predominantly her energy. The energy she has to invest in herself is going to be diminished by those concerns [and] by [not] being able to assure her that in her living space, men will not be intruding on her private life.
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> . . . .

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[1] The majority cites only one case dealing with a female penitentiary. *Forts v. Ward*, 621 F.2d 1210 (2d Cir. 1980). *Forts*, however, is vastly different from this case. It involved a suit by prisoners against the prison administrators; the prisoners sought to enjoin the prison from assigning male guards to duties in the housing and hospital units of the prison. Thus, *Forts* involves the straight-forward conflict between the prisoners' rights to privacy and the guards' rights under Title VII. Rehabilitation was not an issue, and indeed, the prison administrators saw no need to remove the male guards.

> [W]omen, as a rule, when they come in, they have a history of being very influenced, if not dominated by men in their lives and one of our major goals is to teach them . . . self-respect and . . . dignity[,] [and that they] have the capability of making their own decisions and living their lives based on their own perceptions of what they want and what their options are. And [if] we establish atmospheres where men are playing the primary dominant force, which is somewhat natural in a prison anyway, in terms of staffing, or power or authority over inmates, we were to perpetuate that, that's just going to further compound what she's lived with in the past and she will probably defer to the male and that's not something we want her to do.

Tr. IX at 39, 43-44. The district court dismissed this purpose because the defendants failed to show "objective evidence, either from empirical studies or otherwise, displaying the validity of their theory," 639 F. Supp. at 280. The majority agrees. It thus concludes that the defendants did not meet their "heavy burden" under the "very narrow bfoq exception to Title VII."

I have no difficulty accepting the majority's formulation of the standard for finding a bfoq. The standard is indeed "extremely narrow," *Dothard v. Rawlinson*, 433 U.S. 321, 334 (1977), requiring proof of "business necessity." *Id.* at 332 n.15. However, by requiring objective evidence and empirical studies, the majority has placed on these defendants an unreasonable burden. The Supreme Court has repeatedly recognized the complexity of the problems facing those responsible for managing our penal system. *See, e.g., Rhodes v. Chapman*, 452 U.S. 337, 352 (1981); *Bell v. Wolfish*, 441 U.S. 520, 547-48 (1979); *Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. 119,

127-29 (1977); *Procunier v. Martinez,* 416 U.S. 396 (1974). In *Procunier,* the Court said:

> Prison administrators are responsible for maintaining internal order and discipline, for securing their institutions against unauthorized access or escape, and for rehabilitating, to the extent that human nature and inadequate resources allow, the inmates placed in their custody. *The Herculean obstacles to effective discharge of these duties are too apparent to warrant explication. Suffice it to say that the problems of prisons in America are complex and intractable,* and, more to the point, they are not readily susceptible of resolution by decree. . . . Judicial recognition of that fact reflects no more than a healthy sense of realism.

Id. at 404-05 (emphasis added). The difficulties of prison administration identified by the Supreme Court are even more perplexing in the context of this case because it involves a female penitentiary. The problems of female penitentiaries are unique, and society is only now awakening to their special circumstances. Between 1940 and 1970, the number of female prisoners in federal and state penitentiaries was relatively constant at about 6,000 inmates. U.S. Department of Justice, Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics* 399 (1986). But from 1970 to 1985 the number of female prisoners more than quadrupled, going from 5,635 inmates to 23,091 inmates. U.S. Department of Commerce, Bureau of the Census, *Statistical Abstract of the United States* 188 (1977); U.S. Department of Commerce, Bureau of the Census, *Statistical Abstract of the United States* 174 (1987). Between 1980 and 1985 alone, the number of female inmates increased from 13,420 to 23,091. *Id.* These increases no doubt have significantly affected conditions in female peni-

tentiaries. Not only do we not know the answers to the problems of a female prison, but we do not even know all the questions. Requiring the superintendent of a female prison working under these conditions to provide objective proof that male guards retard the inmates' rehabilitation is asking the impossible; research into the problems of female prisons is simply too immature to expect so much.

The majority concludes that a footnote in *Dothard v. Rawlinson*, 433 U.S. at 331-32 n.15, means that the degree of scrutiny applied in this case can be no different than the sertuiny applied in a more routine bfoq case. There, the defendants had argued that the court should apply a deferential standard of review to height and weight requirements for prison guards because the requirements had been imposed by state statute. In the *Dothard* footnote, the Court dismissed this argument, noting that "Congress expressly indicated the intent that the same Title VII principles be applied to governmental and private employers alike." *Id.* I have no disagreement with the majority's interpretation of *Dothard*. Private enterprise and public enterprise should be treated the same under Title VII. But this does not prohibit us from recognizing that the unique nature of an enterprise, public or private, may justify gender-based distinctions that would not be permissible in other contexts. *See Dothard*, 433 U.S. at 334 (holding that the unique atmosphere of the Alabama state prisons justified a prohibition on female guards that might not have been justified elsewhere). Thus, there is no reason for the majority to overlook the vast body of Supreme Court precedent emphasizing that prisons present unique management situations. We should recognize that the job of the prison administrator is to find a solution to a prob-

lem that others before have not found. Of *necessity,* the prison administrator is *required to experiment and innovate.* To forbid a prison administrator from seeking new solutions to a riddle that has baffled society for so long is to prevent the administrator from doing what is necessary to fulfill the very "essence" of her "business." *Diaz v. Pan American World Airways,* 442 F.2d 385, 388 (5th Cir.), *cert. denied,* 404 U.S. 950 (1971). So viewed, the defendants in this case have met their burden for establishing a bfoq. They have established a "business necessity" for the practice, *Dothard,* 433 U.S. at 332 n.15; they have to try new approaches.

Today, the majority sends a message that gender-based solutions to prison dilemmas are out-of-bounds, no matter how reasonable the proposal, unless the proposal is supported by objective, empirical evidence. This is indeed a Catch-22. How will any administrator of a female prison obtain any empirical data unless a court will permit a sustained, serious test?

I cannot imagine many cases in which the often-quoted dissent of Justice Brandeis in *New State Ice Co. v. Liebmann,* 285 U.S. 262, 310-11 (1932), would be more appropriate. Pointing out that the "economic and social sciences are largely uncharted seas," he said:

> The discoveries in physical science, the triumphs in invention, attest the value of the process of trial and error. In large measure, these advances have been due to experimentation. In those fields experimentation has, for two centuries, been not only free but encouraged. Some people assert that our present plight is due, in part, to the limitations set by courts upon experimentation in the fields of social and economic science; and to the discouragement to which

> proposals for betterment there have been subjected otherwise. There must be power in the States and the Nation to remould, through experimentation, our economic practices and institutions to meet changing social and economic needs. . . .
>
> To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.

Id. at 310-11.

As a general proposition, we ought not permit employers to elude Title VII's requirements by arguing that they were "experimenting." Rare is the employment situation in which an employer could argue that gender-based distinctions are a "reasonably necessary" approach to innovation. But this case involves a female penitentiary, an institution facing new and unique problems that necessarily require it to navigate "uncharted seas." It is hardly beyond the scope of reasonable experimentation for a prison administrator to conclude that there is a good chance that female prisoners, the majority of whom have been abused by males, might make better progress toward rehabilitation if they did not have to check in, clad only in a bath robe, with a male guard before taking a shower. It is hardly an unreasonable experiment to suggest that these women might adjust more rapidly if they did not have to sleep with the knowledge that male guards could peer into their sleeping rooms at will.

There is perhaps no more isolated minority in the United States today than female prisoners. In this case,

Wisconsin has attempted to help these women become integrated with, and enjoy the full benefits of, society. The objective of Title VII is similar. Yet, the majority holds that this very statute effectively forbids Wisconsin from making such an effort. This is indeed a strange fulfillment of the Congressional intent.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

RAYMOND J. TORRES,
FRANKLIN J. UTZ, and
GERALD F. SCHMIT,

Plaintiffs,

vs.

Case Nos. 83-C-627
83-C-628
83-C-629

WISCONSIN DEPARMENT
OF HEALTH AND SOCIAL
SERVICES, TAYCHEEDAH
CORRECTIONAL INSTITUTION,
NONA J. SWITALA, INDIVIDUALLY
AND IN HER OFFICIAL CAPACITY,
CERTAIN UNNAMED DEFENDANT
EMPLOYEES OF THE WISCONSIN
DEPARTMENT OF HEALTH AND
SOCIAL SERVICES, INDIVIDUALLY
AND IN THEIR OFFICIAL CAPACITY,

Defendants.

DECISION AND ORDER

(Filed May 16, 1986)

This case concerns plaintiffs' claim of reverse sex discrimination pursuant to their employment as male prison guards at a female prison. Accordingly, plaintiffs seek relief pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (1976) ("Title VII"). An eleven-day court trial was conducted on this matter commencing July 23, 1985, during which various fact and expert witnesses offered testimony. Furthermore, prior to trial, the Court conducted a tour of the facilities at the subject female prison, Taycheedah Correctional Institu-

tion ("TCI"). The following constitutes the Court's findings of fact and conclusions of law.

Background

I. *The Plaintiffs*

1. Plaintiff, Raymond R. Torres, is an adult male resident of Fond du Lac, Wisconsin, 48 years of age. He is currently employed by the Wisconsin Department of Health and Social Services (DHSS), Division of Corrections (DOC), as a Correctional Officer 2. Torres became employed by DHSS in 1975 and was initially employed as a CO-1 at Waupun State Prison ("WCI"). He worked in various cell halls and units of the institution, ultimately being promoted to CO-3 (Sergeant). In December, 1978, Torres transferred from Waupun Correctional Institution to TCI at the urging of his wife so that he would be working closer to his residence. The transfer was as CO-3.

2. Plaintiff, Frank J. Utz, is an adult male resident of Fond du Lac, Wisconsin, 56 years of age. He is currently employed by DHSS, Division of Corrections as a CO-2. Utz was initially employed by DHSS in April of 1967 and worked as a Youth Counselor I at the Kettle Moraine Correctional Institution. He spent 5 years there, rising to a CO-3 and spent 5 years at the Winnebago State Camp. In 1979 he transferred to TCI as a CO-3.

3. Plaintiff, Gerald Schmit, is an adult male resident of Fond du Lac, Wisconsin, 41 years of age. He is currently employed by DHSS, Division of Corrections as a CO-2. Schmit began working for DOC at 22 years of age. After 6 months at WCI he moved to a job at Mercury Marine. Approximately a year later he again went to

work for DOC as a CO-1 and has been with the Division continuously since then. He left WCI in 1975 and transferred to TCI as a CO-3 after passing a promotional exam.

DHSS has three classifications for its correctional officers ranked, as follows, in ascending order: Correctional Officer 1 (CO-1); Correctional Officer 2 (CO-2); and Correctional Officer 3 (CO-3). At TCI officers from all three classifications are stationed in the housing units.

All correctional officers, regardless of sex, receive the same training and are offered educational courses, including courses that teach the officers how to interact with, relate to, and perceive the inmates.

Generally speaking correctional officers are responsible for the security, custody, control and treatment of inmates according to the statutes, administrative rules, institutional policies, post orders, and work rules. The specific job duties for a given post are set forth in "post orders" for that particular post. Each post at TCI is assigned a number and written orders for each numbered post are available from the shift lieutenants.

Posts in correctional institutions in Wisconsin are governed by contract and are filled by qualified officers on the basis of seniority. The CO-3 stationed in a housing unit and in charge thereof is sometimes referred to as the "sergeant." TCI further distinguishes its correctional officers staffed in the housing units by designating certain positions as that of "rover." Generally, the rover's duties entail "roving" the corridors of the various housing units to ensure that order and security are maintained. Occasionally a rover will fill in for other correctional

officers stationed in the housing units while they are on break.

As indicated, Torres, Utz and Schmit each transferred into TCI from elsewhere in the system. This occurred in 1978, 1979 and 1975 respectively. They were all CO-3's in housing units at TCI working primarily first and second shift. As house sergeants their station was in an office on the first floor of each floor and primarily their duties are performed in that office although at times the housing sergeant must perforce go into various areas of the living unit for which he is responsible. It is undisputed that the plaintiffs were competent and qualified CO-3's and that they performed their duties satisfactorily. No claim is made by defendants that any plaintiff was demoted because of a deficiency of performance.

II. *The Defendants*

The Wisconsin Department of Health and Social Services is the largest branch of the state government. It has its principal office in Madison, Wisconsin, and through its Division of Corrections ("DOC") is responsible for the operation and administration of all of the institutions in the Wisconsin correctional system.

The defendant Taycheedah Correctional Institution is a prison for females operated by DHSS. It is the only women's maximum security prison in Wisconsin, and is located on an attractive wooded site just below the Niagara escarpment on the eastern outskirts of Fond du Lac, Wisconsin. It is surrounded by a cyclone fence topped with barbed wire. The grounds are roomy and well cared for. There are a variety of administrative, activity and utility

structures on the grounds, but this case deals with the housing units. Four of these buildings—Harris Hall, Addams Hall, Neprud Hall and Grover Segreation Unit house the inmates and are (except for Grover) the living units which contain officer positions presently unavailable to the plaintiffs as the result of the BFOQ at issue herein.

Defendant Nona J. Switala, is the Superintendent of TCI and has been such since September, 1978. Prior to assuming said responsibility she was the Director of Treatment and Services at TCI for about 3 years.

III. *Taycheedah Correctional Institution*

All of the residence halls at Taycheedah are masonry buildings with three residence floors. The buildings have varying dates of construction and varying floor plans. Grover Hall was just finished in 1983. It contains the inmate receiving and orientation facilities, segregation area, health services, control center and visitation center. The plaintiffs were never posted as CO-3's in Grover inasmuch as the BFOQ plan had been put in place prior to the construction of that hall.

TCI was originally a women's prison. In July 1975 DHSS designated the Wisconsin Home for Women a co-correctional institution, changed the name to Taycheedah Correctional Institution and transferred male inmates and some male officers there. This situation continued until February, 1978. Then TCI again became a prison for females only. It houses minimum, medium and maximum security inmates, all felons. During Switala's tenure it has housed between 173 and 200 female inmates.

Each housing unit's staffing patterns presently vary —and have varied in the past—depending upon the security classification of the building. Staffing is done around the clock with three shifts: 6 a.m.-2 p.m.; 2 p.m.-10 p.m.; 10 p.m.-6 a.m. Each unit always has at least one CO-3 (Sergeant) working each shift. The post of such officers is an office on the first floor of each building and the majority of a sergeant's duties are performed right there.

In addition to the CO-3 on duty, each housing unit has a varying number of CO-1's and CO-2's, depending upon the security classification of the inmates housed therein, the physical layout of the building, and the types of activities requiring supervision. Throughout the years under scrutiny these staffing patterns have varied greatly as changes occurred in the institution and its policies.

Neprud

From 1978 through March 1985, Neprud Hall was classified as the maximum security building. A sergeant was stationed on the first floor on each shift throughout this period. The other staffing patterns at Neprud varied during this period to the extent as follows: 0-2 correctional officers on the first floor during the first and second shifts; 1-3 correctional officers on second floor during the first and second shifts; 1-2 correctional officers on third floor during the second and third shifts; and 0-1 correctional officers on second and third floor during the third shift.

From March, 1985 to the present Neprud Hall has been classified as the minimum security building and is

staffed by a sergeant and a CO-3/rover on the first and second shifts and by a sergeant and another correctional officer on the third shift.

Harris

From 1978 to September, 1982, Harris Hall was classified as the minimum security building. The staffing patterns during this time were as follows: in 1978 and 1979 there was a sergeant on the first floor for all three shifts, and a correctional officer on third floor for first and second shifts; from 1980 to September, 1982, there was only a sergeant on the first floor for all three shifts. In September, 1982, Harris Hall was classified as the medium security building and remains such today. It was staffed with a sergeant on the first floor and a correctional officer on the third floor during all three shifts. There was also a correctional officer on the second floor during first and second shift. This pattern was altered slightly in March, 1985, by putting a correctional officer on the third floor only during the third shift. This remains the current staffing pattern at Harris Hall.

Addams

From 1978 to September, 1982, Addams Hall was classified as the medium security building at TCI. The staffing pattern varied during this period. However, one sergeant was always stationed on first floor and 1-2 correctional officers were always stationed on third floor during each shift. Moreover, during first and second shift there was always 0-1 correctional officer stationed on first floor and 1-2 correctional officers stationed on the second floor.

In September, 1982, Addams Hall was re-classified to the minimum security building and was staffed with a sergeant on the first floor and a correctional officer on the third floor during all three shifts and by a rover during first and second shifts.

In March, 1985, Addams Hall became the maximum security unit and was staffed with a sergeant on the first floor, a correctional officer on second floor and a rover during first and second shifts. This is the current pattern at Addams.

Grover

In late 1983, TCI opened Grover Hall which contains a segregation unit, health service unit, and the receiving and orientation unit. The staffing at Grover is not pertinent or necessary to the resolution of the case.

Currently, inmates in Harris, Addams, and Neprud Halls are housed in single, double and multiple occupancy rooms. The inmates' rooms in the housing units are not cells but rather resemble college dormitory facilities. Each room has a bed for each inmate, desk, chair and light. The rooms have solid doors. Each door has a clear glass window in the door measuring approximately 4'' x 6'' at eye level. Windows in each room are standard, without bars, and can be raised a few inches to allow air circulation but generally not enough to allow a body to pass between the raised window and the sill.

All of the rooms in the housing units contain a toilet and a wash basin. In 1983, hospital-style privacy curtains (Ex. 612) were installed around the toilets in the rooms in Neprud and Harris Halls. These curtains are

suspended from the ceiling and can be drawn around the toilet when in use, thereby leaving only the occupant's feet visible. Prior to the installation of these curtains, inmates in multiple occupancy rooms could not shield themselves from being viewed by their inmates—or someone peering through the glass window (unless a "privacy card" described below was in place)—as they dressed or performed personal hygiene or toilet functions. Eventually all rooms in the housing units will have privacy curtains.

Since before 1975, inmates have been permitted to place small rectangular pieces of cardboard, termed "privacy cards" over the observation windows on the doors during nighttime hours. Since the cards were placed on the outside of the door, and were capable of being lifted sometimes, in 1976 inmates were given permission to cover the observation window with a privacy card on the inside of the room door for up to 10 minutes while dressing or using the toilet. Since 1983 the policy has been that from 9 p.m. to 6 a.m. inmates are permitted to have the privacy cards continuously over the window only on the outside of the door. They may still use the cards on the inside for the 10 minute maximum.

Each floor in the residence halls has a shower room equipped with from one to three shower stalls and one to three toilet stalls. Some shower rooms also have one or more tubs. Prior to the installation of the individual toilets in each room, the shower rooms also constituted the toilet facilities. Each of the shower rooms has a solid door opening to the hallway. Some of these doors have windows but these have been rendered opaque. Each

shower stall is equipped with a curtain or screen which shields the inmate from view while occupying a shower stall. The toilets in the shower rooms are located in stalls with solid doors and only an inmate's feet are visible while occupying a toilet in the shower stalls. No privacy screens have ever been provided in the shower rooms.

Except in the present minimum security building (Neprud) institution policy is that generally only one inmate may occupy the shower room at any one time. However, roommates are permitted in the shower room together. Inmates wishing to shower must sign up for shower time with the floor officer; are allowed 15 minutes in the shower room; and must go to and from the shower room in modest dress, wearing at least a robe or housecoat. In the routine shower procedure correctional officers have no occasion to see an inmate undressed. Only in emergencies or in cases of rule violations would a correctional officer see an inmate in any state of undress.

Prior to and since the implementation of the BFOQ plan the correctional officers did not and do not routinely enter the shower rooms while the rooms are occupied by inmates.

The correctional officers at TCI perform body counts at specified times throughout the day (7:30 a.m.; 12:30 p.m.; 5:30 p.m.; 9:30 p.m.; and once an hour on the third shift) and the inmates are all aware of the times when these counts are to be performed. Counts at night are done by the correctional officers by looking in the room observation windows. Inmates are not required to wear nightclothes, but appropriate sleepwear is available from the institution. Night counts do not result in an inmate

being observed unclothed unless the inmate takes no steps to cover herself. The officers taking night count are required to "see skin" to verify the presence of each inmate.

The Wisconsin Administrative Code recognizes three varieties of searches which are appropriate to a correctional institution. All three are performed at TCI. Pat searches (1) may be performed at any time with certain restrictions and requirements, and are performed while the inmate is fully dressed. The inmate must empty all her pockets and then the searching officer runs her hands over the inmate's entire body. The Wisconsin Administrative Code does provide that opposite gender correctional officers may perform pat searches, however all witnesses made it clear that at TCI an unwritten rule is that only female officers can perform pat searches there. Strip searches (2) must be authorized by a lieutenant; are performed only in private, and only by officers of the same sex as the inmate, except in an emergency. Body cavity searches (3) are not considered to be within the duties of correctional officers. They are performed only by medical personnel. Correctional officers do enter inmate's quarters for room searches, but these are uniformly performed while the inmates are out of the room.

It is undisputed that when male correctional officers were stationed within the housing units at TCI, searches were adequately and routinely performed by available female correctional officers without impairment of TCI's security.

IV. *The TCI BFOQ Policy*

In recent years, of course, the DHSS, as all Wisconsin state agencies, has had an official policy of equal oppor-

tunity employment. In January of 1977, DOC formalized a policy that mandated equal opportunity employment in all of its correctional facilities save those where invasion of inmate's privacy was a regular and relatively continuous requirement of the correctional employee's job.

In August, 1978, the Wisconsin Division of Corrections authorized all correctional institution superintendents to submit requests for gender based bona fide occupation qualification (BFOQ) posts. It specified concern with problems like strip searches, gang showers, and living unit supervision. Responding to the authorization in September, 1978, TCI's then Acting Superintendent proposed that five correctional officer posts in TCI's housing units be subject to BFOQ. Only one of these posts was staffed by a CO-3. This plan was never formally approved by the DOC.

In June, 1980, DHSS approved a different BFOQ Plan for TCI ("the Plan") which had been prepared by defendant TCI Superintendent Nona J. Switala. It called for 19 of the 27 CO posts in the residence halls, including all of the CO-3 posts, to be BFOQ'd. The Plan was gradually put into operation, beginning on September 1, 1980 with completion scheduled for September 1, 1982. The phasing in of the Plan was to be accomplished by a gradual process of "attrition"; that is those posts BFOQ'd under the Plan would, as vacancies therein occurred, only be filled with female officers. Posts subject to the Plan which were still held by a male occupant as of September 1, 1982, would be vacated then and replacements would be only female.

Prior to the Plan all CO positions at TCI were open to all qualified officers without restrictions as to gender. With full implementation of the BFOQ of 18 CO-3 positions at TCI 15 of the Sergeant (CO-3) positions (all of the CO-3's in the residence halls) were restricted to females. With full implementation in September, 1982, each plaintiff lost his CO-3 post in the housing units and was involuntarily demoted in rank to a CO-2. These demotions occurred solely because of plaintiff's sex. Plaintiffs were removed from their supervisory posts and are now working under female CO-3's with less seniority and less experience than plaintiffs. Presently, except for two "rover" posts on the first and second shifts, all correctional officer posts in the housing units, including every CO-3 post in those units is BFOQ.

The Plan at TCI was not created to meet specific allegations of inmate's privacy being violated by male officers—but rather because the rules for assigning posts and shifts between officers grew increasingly complex and to have a posting procedure that would recognize seniority, officer's personal desires, institutional requirements, and still have enough female CO's present at all shifts to insure what the institution felt was necessary for inmate privacy. The administration decided to go BFOQ when there were insufficient female officers present to meet institutional needs. Testimony at trial established that an occasion never did actually arise. With the full implementation of the Plan at TCI male correctional officers at that institution are prohibited from working in, promoting to, or transferring to any position that has been BFOQ'd.

Although all three plaintiffs were involuntarily demoted, their wages were "red circled" and they continue to receive the hourly wage rates of CO-3's. They have however received a marked contraction in the number of posts at the institution to which they may aspire. Utz claims a loss of overtime and associated benefits in the amount of $4,967.93 as of June 30, 1985; Torres an amount of $1,168.76 as of said date. Plaintiff Schmit does not claim such losses.

The Wisconsin Division of Corrections operates some six other adult correctional institutions (Waupun, Green Bay, Dodge, Fox Lake, Kettle Moraine, and Milwaukee). None of the other adult institutions operated by the state, including the Women's Correctional Center in Milwaukee, have any posts denominated BFOQ. Female CO's are used in the male residence halls of male correctional institutions. Female correctional officers employed at male prisons in Wisconsin testified at trial that they routinely conduct inspections of the shower and toilet areas at those prisons and often see male inmates in various stages of undress at those prisons. Furthermore, they are authorized, and sometimes required to conduct pat searches on male inmates.

DISCUSSION

As a preliminary matter, the Court notes that the defendants named in the caption are still the defendants of record in this case. In a post-trial letter to the Court, defendants' counsel states that the only remaining defendant in this action is DHSS. Plaintiffs' counsel responds that all of the named defendants are employers within the terms of Title VII and are, therefore, still

appropriately in this lawsuit. All defendants were named upon this lawsuit's commencement and none of them have presented motions to be stricken or dismissed from this action. At this late juncture, the Court is unwilling to dismiss various defendants upon its own motion unless it is glaringly apparent that such defendants do not belong in this lawsuit. The Court perceives no such circumstances.

I. *The Purpose And Scope Of Title VII*

Title VII prohibits discrimination in employment on the basis of sex by a state or by its agencies. Discrimination against either sex is prohibited by Title VII. *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 285, 386 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971). The Bona Fide Occupation Qualification (BFOQ) exception to this prohibition is contained in 42 U.S.C. § 2000e-2(e) which provides in pertinent part:

> Notwithstanding any other provision of this subchapter . . . it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis . . . of sex . . . in those certain instances where . . . sex . . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . .

This exception is to be interpreted narrowly. *Dothard v. Rawlinson*, 433 U.S. 321, 324 (1976); 29 C.F.R. § 1604.2(a). Accordingly, mere administrative convenience is insufficient to justify a BFOQ exception. *Gunther v. Iowa State Men's Reform.*, 612 F.2d 1079, 1087 (8th Cir. 1980).

Rather, this exception allows "discrimination based on sex . . . when the essence of the business operation would be undermined." *Diaz v. Pan Am. World Airways, Inc., supra,* at 388. Further, where an employer seeks to use the BFOQ exception because of a perceived potential infringement of its clients' or customers' privacy, the employer must demonstrate that it could not rearrange job responsibilities or engage in alternative practices to minimize or eliminate the conflict between the perceived privacy interests and the equal employment rights. *See Gunther, supra* at 1086; *Harding v. Stynchcomb,* 691 F.2d 1364, 1370-71 (11th Cir. 1982).

In the present case, by virtue of the fact that defendants subjected certain correctional officer positions to BFOQ based on sex, plaintiffs are not obligated to establish a *prima facie* case of sexual discrimination pursuant to the requirements of *McDonnell-Douglas Corp. v. Green,* 411 U.S. 792 (1972). *See Harden v. Dayton Human Rehabilitation Center,* 520 F. Supp. 769, 777 (S.D. Ohio 1981). The discrimination is an established fact by virtue of the agency policy of "overt discrimination." Consequently, the defendants bear the burden of proving that the discrimination against plaintiffs falls within the narrow terms of the BFOQ exception. Courts have described this burden as a heavy one. *Fesel v. Masonic Home of Del., Inc.,* 447 F. Supp. 1346, 1350 (D. Del. 1978), *aff'd* 591 F.2d 1334 (3d Cir. 1979), and have held the BFOQ exception to be justified only in rare, appropriate circumstances. *Manley v. Mobile County, Ala.,* 441 F. Supp. 1351, 1357, (S.D. Ala. 1977).

II. *Defendants' Asserted Justifications For the BFOQ Plan*

Defendants contend that the Plan is justified because of security, privacy and rehabilitation concerns. Initially, plaintiffs argue that defendants are now precluded from asserting security and rehabilitation as justifications for the Plan since the only stated reason for the Plan upon its creation and implementation was to ensure inmate privacy. Security and rehabilitation are, plaintiffs contend, improper *ex post facto* justifications for the BFOQ plan. The Court need not determine whether security and rehabilitation were actually reasons for the Plan's creation and, if not, whether defendants are thereby precluded from presently asserting these factors to establish the Plan's propriety, since defendants have failed to show that security, privacy or rehabilitation would be diminished at TCI absent the Plan.

A. *Security*

To be sure, security or protection of the public, staff and inmates through adequate supervision during confinement is a basic objective of the Wisconsin correctional system. Appendix, Wis. Adm. Code § HSS 306.03 (August 1980). Thus security constitutes at least part of the essence of the activity of the defendant employers and under the concepts of *Diaz supra*, employment of only one sex in a BFOQ'd position would be permissible only when that essence would be undermined should this discrimination not occur.

The court in *Griffin v. Michigan Department of Corrections*, 31 Empl. Prac. Dec. (CCH) ¶ 33,482, November

12, 1982, slip. op. (E.D. Mich. 1982) concluded that in order to prevail on a BFOQ defense the employer must show: (1) that the essence of the activity in question would be undermined by the employment of one sex (here males) in the positions in dispute; (2) that there is reasonable cause to believe that all, or substantially all, members of one sex (here males) would be unable to perform the job duties in question safely and efficiently; (3) that failure to allow members of one sex (here males) to work the positions in question was based on actual sexual characteristics rather than upon stereotyped assumptions; and (4) that there were no less restrictive alternatives which could have been utilized to avoid the BFOQing of the positions in question.

Plaintiffs contend that defendants have not and cannot establish any of these factors. Defendants argue they have. Each of these constitute factual conclusions. Examining the evidence in this trial the Court is forced, somewhat against its own culturally induced proclivities, to conclude that defendants have, indeed, failed to establish any of the four positions used in the *Griffin* analysis.

Testimony established that male correctional officers successfully filled all of the presently BFOQ'd positions from 1975 until the advent of the Plan in the fall of 1982 without any contention that TCI suffered from a lack of security. There seemed to be no dispute that TCI was secure *before* and *after* BFOQ. Male CO's were used to restrain violent inmates before and after BFOQ. If security was a basis upon which the Plan was sought the Court finds no aspect of security that suffered as a consequence of permitting both sexes in any positions at TCI.

Nor does the Court believe that all or substantially all males, otherwise qualified, such as the three plaintiff sergeants, could not perform the duties of CO-3's in the living quarters safely and efficiently. They had in the past and there is no intimation that the BFOQ was activated because of a deficiency on the part of any plaintiff.

There was no effort by defense to show that BFOQ Plan was created because of some actual sexual characteristics rather than upon stereotyped assumptions. The positions were BFOQ simply because the defendants felt that they should be filled by females—not because of some essential characteristic—but simply because they were of the same sex as the inmates.

On the issue of less restrictive alternatives the Court finds that no administrative alternatives to a BFOQ plan were considered when the Plan was advanced to HSS. The Plan was proposed to enhance inmate privacy and because of a perceived anxiety that in order to meet the demands of adequate staffing patterns, "bid" requests, seniority rights, and shift and vacation needs, a point might come where there would not be sufficient female personnel on duty at a given time to provide for those functions that required females by institution policy. Testimony was that it got "tough" to be sure enough females were available on certain shifts following the posting procedure. The Court finds as a matter of law that before an employer-defendant can overcome the strong policy against sex discrimination and avail itself of the narrow exception of a BFOQ it must establish that no administrative alternatives are available or feasible that can avoid overt sex discrimination. The Court finds as a fact that

the defendants did not attempt to utilize administrative alternatives or procedures to accomplish their institution goals without violating the national policy against sex discrimination. Failure to do so destroys one of the requirements for a BFOQ defense. *Harding v. Stynchcomb, supra.*

The Court notes that prior to the Plan's implementation various procedures employed in the TCI housing units were designed to ensure inmate privacy despite the presence of male officers. That is, for example, prior to the Plan's implementation, TCI inmates could use privacy cards in accordance with the procedures described above and as a result, correctional officers did not routinely observe inmates unclothed during established activities for shower and toilet use. The defendants contend that observation is the core of security. An argument favoring the Plan's validity would be that the correctional officer positions within the housing units had to be BFOQ'd so that these procedures could be abolished. However these procedures were not abolished and remained intact subsequent to the Plan's installation. It seems clear that these arrangements were designed to ensure inmate privacy as to all persons and not just as to male correctional officers. Consequently, the Plan does not enhance security within the housing units by allowing for the modification or elimination of routine procedures designed to increase inmate privacy, but which also, it could be argued, reduced security.

Moreover, defendants' presented no evidence showing that prior to the Plan's implementation security was diminished because of male correctional officers' inability,

due to administrative code mandate and TCI unwritten rule, to perform searches. Finally, defendants have not presented any evidence that inmate escapes have been significantly reduced or that order within the housing units has increased after the Plan's implementation. The Court finds that defendants have failed to justify the Plan based on security reasons.

B. *Rehabilitation*

At trial, defendants attempted to justify TCI's BFOQ Plan based on a theory of the unique rehabilitation needs of the female inmate. This theory's premise is that prior to incarceration a large number of inmates at TCI (approximately 60%) had been physically or sexually abused by males. Because of this abuse, the theory continues, female inmates are uncomfortable with the presence of males in the housing units, which presence thereby deters their rehabilitation. Defendants contend that this theory can be used as a basis for distinguishing between male and female prisons and the use of opposite gender correctional officers therein.

Defendants presented various witnesses familiar with the field of corrections who testified in support of this theory. In opposition, plaintiffs also presented witnesses familiar with the field of corrections who testified that the presence of male correctional officers in the housing units would have a beneficial effect on inmate rehabilitation.[1]

Defendants offered only a *theory* of rehabilitation as a justification for the BFOQ Plan. They offered no objective evidence, either from empirical studies or oth-

erwise, displaying the validity of their theory. Indeed, Superintendent Switala testified that there had been no change in the recidivism rate at TCI from 1980 to the present. The Court refuses to find the Plan valid based strictly on the unproven rehabilitation theory presented by defendants at trial. Accordingly, the Court holds that the TCI BFOQ plan is not justified based on rehabilitation concerns.

C. *Inmate Privacy*

Although defendants were permitted at trial to argue their positions regarding security and rehabilitation as justifications for the BFOQ Plan, memos from Larry Tainter, Chief of Personnel and Administrative Services make it clear that from the point of view of DHSS the need to establish a BFOQ could only be based on the need to protect inmate privacy. The Court has already determined that within the context of this case's factual framework, security and rehabilitation are inadequate bases upon which to validate a BFOQ. The defendants' position then must rise or fall on the need to ensure inmate privacy. Plaintiffs respond with two arguments. First, plaintiffs contend that inmates have no constitutional right to privacy and, therefore, inmate privacy concerns cannot be used as a justification for employment discrimination. Second, plaintiffs assert that even if inmates possess privacy rights, they would not be violated by employing male correctional officers in the housing units at TCI.

Wolff v. McDonnell, 418 U.S. 539 (1973), instructs us on p. 555 that:

> Lawful imprisonment necessarily makes unavailable many rights and privileges of the ordinary citizen. . . .

In its opinion, after this foundational statement, the Court goes on:

> But though his rights may be diminished by the needs and exigencies of the institutional environment, a prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime.

Id. The court then lists some of those rights which prisoners retain (privacy is not among those listed).

One of those rights which is necessarily limited as the result of one's incarceration is the right to be free of unwanted intrusions into one's personal privacy. *Bonner v. Coughlin*, 517 F.2d 1311 (7th Cir. 1975), *cert. denied*, 435 U.S. 932 (1978). Any rookie being drafted into the armed forces will instantly recognize the parallel. These contradictions of the right of privacy follow from the responsibilities imposed upon prison authorities when convicted individuals are committed to their care. Carrying out those responsibilities justify such intrusions as observation, pat-down searches, frisk searches, even body-cavity searches. *Bell v. Wolfish*, 441 U.S. 542 (1979). In *Smith v. Fairman*, *supra*, the Seventh Circuit Court of Appeals had occasion to consider the collision between institutional needs and the still vaguely defined right of personal privacy. It noted that in *Dothard*, *supra*, the Supreme Court upheld an Alabama policy against employing female guards in contact positions at the state's male maximum security prison, but also noted that the Court's holding rested entirely on the uniquely dangerous conditions within that state's prison and opined:

> It thus appears that in the absence of those conditions, a state may not legally refuse to hire women as guards in a male prison. *See Gunther v. Iowa State*

Men's Reformatory, 612 F.2d 1079 (8th Cir.), *cert. denied,* 446 U.S. 966 (1980).

The Seventh Circuit in *Smith* then went on to state that *Gunther* does not mean that inmates are entirely without constitutional protection against invasions of their privacy by members of the opposite sex. It surveyed *Forts v. Ward,* 471 F. Supp. 1095 (S.D.N.Y. 1979) vacated in part, 621 F.2d 1210 (2nd Cir. 1980) where that circuit held that surveillance of female inmates in a maximum security facility while undressed, using toilet facilities, showering or sleeping violated their right of privacy and that on the facts in that case, the rights of the male guards to equal opportunity "must in some measure give way to the right of privacy." Continuing a survey of cases on point, the Seventh Circuit panel said:

> the resulting conflict between these two interests has normally been resolved by attempting to accommodate both interests through adjustments in scheduling and job responsibilities for the guards.

Smith, supra, at 55. With the plethora of cases advanced by both sides before it, this Court cannot agree with plaintiffs' first contention that inmates lack absolutely any constitutional rights to privacy; *Harding v. Stynchcomb, supra,* at 1373 (inmates retain some privacy rights).

Such a conclusion leads perforce to a further examination of the facts in the case at bar. The accommodations between privacy interests and institutional requirements were being made throughout the history of TCI as recounted by all witnesses. It is ironic that a conclusion that further accommodation was too difficult seems to have played some role in seeking the BFOQ. The Court is con-

vinced that further efforts at administrative adjustment could have precluded this stark clash between privacy and equal opportunity. Such further efforts should have been pursued.

Inmates at TCI can use privacy cards while dressing or using the toilet facilities in their rooms. Moreover, two of the three residence halls have privacy curtains installed around the toilets in the rooms and the other hall is expected to be soon equipped with similar privacy curtains. The procedures within the housing units at TCI do not involve correctional officers observing inmates in the nude while they shower. An examination of the correctional officer routine within the TCI housing units reveals that correctional officers, both male and female, would never see an unclothed inmate except during an emergency or where the inmate voluntarily displays her unclothed self or fails to avail herself of the procedures designed to protect her privacy. Based on this and on the Court's personal inspection of the TCI housing units, the Court finds that the system in place at TCI sufficiently protects the inmates' privacy rights without the need for a BFOQ plan.[2]

Based on these findings, the Court holds that defendants have failed to establish the validity of the TCI BFOQ Plan. Accordingly, the Court hereby ORDERS the Plan's abolishment and the reinstatement of the plaintiffs in their previous CO-3 positions. The only remaining issue is plaintiffs Torres' and Utz' damages claim based on lost overtime.

IV. *Damages*

Torres and Utz contend that they suffered monetary damages because they could not work overtime for those positions designated as BFOQ. These plaintiffs presented the testimony of a Certified Public Accountant, David Klumpyan, who calculated the damages allegedly incurred. Mr. Klumpyan calculated these damages by first determining Torres' and Utz' percentage of overtime hours worked of the total overtime hours worked by all TCI correctional officers during the four years preceding the Plan's implementation in 1982. He then took this percentage and multiplied it by the total overtime hours worked by all TCI correctional officers for the years 1983, 1984 and 1985 (through 3-31-85). The resulting product was Mr. Klumpyan's estimate of the overtime hours that Torres and Utz would have worked in the years 1983-1985. From this product Mr. Klumpyan subtracted the overtime hours actually worked by Torres and Utz to arrive at the loss of overtime hours experienced by these plaintiffs. Defendants contend that this method is too speculative to justify an award of damages for loss of overtime.

The Court finds that the method used to determine Torres' and Utz' loss of overtime is specious, at best. The Court first notes that the amount of overtime hours actually worked by these plaintiffs was apparently not affected by the Plan. For the years 1979-1982 Utz worked 362, 316, 278 and 120.5 overtime hours, respectively. For the years subsequent to the Plan's implementation, 1983-1985 (through 3-31-85), Utz worked 335.4, 397 and 229 overtime hours, respectively. As for Torres, during the years 1979-1982 he worked 0, 29.5, 143.5 and 40.25 overtime hours, respectively. For the years 1983-1985 (through 3-

31-85), Torres worked 116.5, 50.86 and 52 overtime hours, respectively.

Based on these figures, the Court is unable to see how Torres and Utz were adversely affected in terms of lost overtime opportunities because of the Plan's implementation. Plaintiffs' method used to calculate their loss, which relies primarily on calculating the percentage of overtime worked by them of the overtime worked by all TCI correctional officers, seems contrived and illogical absent any showing why plaintiffs' overtime worked varies with the amount of overtime worked by all of their colleagues. It seems more likely that the reasons why one chooses to work overtime are indigenous to that person and are unrelated to whether that person's colleagues choose to work overtime. Accordingly, the Court hereby finds that plaintiff's Torres and Utz have failed to establish monetary damages in this case and DENIES the same.

SO ORDERED this 16th day of May, 1986, at Milwaukee, Wisconsin.

/s/ Robert W. Warren
UNITED STATES DISTRICT JUDGE

FOOTNOTES

1 Various courts have recognized that opposite gender correctional officers can enhance inmate rehabilitation by contributing to the normalization of the prison's atmosphere. *Bagley v. Watson*, 579 F. Supp. 1099 (D.C. Or. 1983) (N.D. Cal. 1984); *Forts v. Ward*, 471 F. Supp. 1095, 1099 (S.D.N.Y. 1979), *rev'd in part on other grounds*, 621 F.2d 1210 (2d Cir. 1980); *Hardin v. Stynchcomb*, 691 F.2d 1364 (11th Cir. 1982); *Doe v. Duter*, 407 F. Supp. 922, 925 (W.D. Wis. 1976).

2 This finding is bolstered by the defendant's use of the non-BFOQ'd rover in the housing units as described above.

JUDGMENT ORDER—REHEARING EN BANC

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

October 17, 1988.

Before

Hon. WILLIAM J. BAUER, Chief Judge
Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. HARLINGTON WOOD, JR., Circuit Judge
Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. RICHARD A. POSNER, Circuit Judge
Hon. JOHN L. COFFEY, Circuit Judge
Hon. JOEL M. FLAUM, Circuit Judge
Hon. FRANK H. EASTERBROOK, Circuit Judge
Hon. KENNETH F. RIPPLE, Circuit Judge
Hon. DANIEL A. MANION, Circuit Judge
Hon. MICHAEL S. KANNE, Circuit Judge

No. 86-2161

RAYMOND J. TORRES, et al.,	)	Appeal from the
	)	United States
Plaintiffs-Appellees,	)	District Court
	)	for the Eastern
vs.	)	District of
	)	Wisconsin.
WISCONSIN DEPARTMENT	)	Nos. 83 C 627,
OF HEALTH & SOCIAL	)	83 C 628
SERVICES, et al.,	)	Judge Robert
	)	W. Warren
Defendants-Appellants.	)	

This cause was reheard en banc on the record from the United States District Court for the Eastern District of

Wisconsin, ———— Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court and that the judgment of the said District Court in this cause appealed from be, and the same is hereby, REVERSED, with costs, and the cause is REMANDED, in accordance with the opinion of this Court filed this date.

JUDGMENT—ORAL ARGUMENT

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

January 29, 1988

Before

Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. KENNETH F. RIPPLE, Circuit Judge
Hon. HUBERT L. WILL, Senior District Judge*

RAYMOND J. TORRES, FRANKLIN J. UTZ, and GERALD F. SCHMIT,	) Appeal from the United States District Court for the Eastern District of Wisconsin. Nos. 83 C 627, 83 C 628 Judge Robert W. Warren
Plaintiffs-Appellees,	
No. 86-2161 vs.	
WISCONSIN DEPARTMENT OF HEALTH & SOCIAL SERVICES, et al.,	
Defendants-Appellants.	

This cause was heard on the record from the United States District Court for the Eastern District of Wisconsin, —— Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this date.

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* The Honorable Hubert L. Will, Senior District Judge for the Northern District of Illinois, is sitting by designation.

JUDGMENT IN A CIVIL CASE

United States District Court

EASTERN DISTRICT OF WISCONSIN

Docket Number [consolidated] 83-C-627, 83-C-628 & 83-C-629

RAYMOND J. TORRES, FRANKLIN J. UTZ, and GERALD F. SCHMIDT, Plaintiffs,

V.

Wisconsin Department of Health and Social Services, et al., Defendants.

HON. ROBERT W. WARREN

( ) *Jury Verdict.* This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

(X) *Decision by Court.* This action came to trial before the Court with the judge named above presiding. The issues have been tried and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that based on the Courts findings, defendants have failed to establish the validity of the Taycheedah Correctional Institution's Bona Fide Occupation Qualification Plan. Accordingly, the Court orders the Plan's abolishment and the reinstatement of the plaintiffs in their previous CO3 positions. Further, the Court finds that plaintiffs Torres and Utz failed to establish monetary damages in regard to overtime and the Court denies same.

Filed May 16, 1986

Sofron B. Nedilsky, Clerk

/s/ By: Deputy Clerk

(2)

Supreme Court, U.S.
FILED
JAN 17 1989
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No. 88-1046

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1988

RAYMOND J. TORRES, FRANKLIN J. UTZ, and GERALD F. SCHMIT,

Petitioners,

v.

WISCONSIN DEPARTMENT OF HEALTH AND SOCIAL SERVICES, TAYCHEEDAH CORRECTIONAL INSTITUTION, NONA J. SWITALA, and CERTAIN UNNAMED DEFENDANT EMPLOYEES OF THE WISCONSIN DEPARTMENT OF HEALTH AND SOCIAL SERVICES,

Respondents.

OBJECTION TO PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether this case is ripe for review by the supreme court where the court of appeals remanded the case to the

district court for the presentation of additional evidence and reconsideration by the district court in light of the totality of the evidence before it?

2. Whether a gender bona fide occupational qualification ("BFOQ") in a female prison can be based on the rehabilitation needs of the female inmates where rehabilitation is one of the primary purposes of the institution?

3. Whether in order to meet its burden of proof under Title VII with regard to a gender based BFOQ plan adopted for rehabilitation purposes, a prison administrator must be able to introduce validation studies or similar statistical evidence or whether the burden may be carried by expert testimony and other kinds of evidence?

4. Whether the district court is free to completely substitute its judg-

ment for that of a prison administrator in a Title VII case where the administrator's reasoned judgment is based on available information and experience or that judgment is entitled to be accorded some limited deference or, alternatively phrased, substantial weight?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	iii
OPINIONS BELOW	1
JURISDICTION	1
STATUTES INVOLVED	1
STATEMENT OF THE CASE	1
A. Facts and background.	1
1. District court decision and order.	10
2. Court of appeals panel decision.	11

Page

3. Court of appeals on en banc decision. 12

REASONS FOR DENYING THE WRIT 14

I. THE CASE IS NOT RIPE FOR REVIEW. 14

II. THE WRIT SHOULD BE DENIED BECAUSE THE EN BANC DECISION IS CONSISTENT WITH THE DECISIONS OF THE SUPREME COURT AND THOSE OF THE CIRCUITS. 17

III. THE EN BANC DECISION DOES NOT PERMIT SEX DISCRIMINATION WITHOUT AN ADEQUATE BASIS. 22

IV. REHABILITAITON CAN SERVE AS THE BASIS FOR A BFOQ. .. 26

CONCLUSION 28

CASES CITED

Chambers v. Omaha Girls Club Inc., 834 F.2d 697 (8th Cir. 1987) ... 24

Dothard v. Rawlinson, 97 S. Ct. 2720 (1977) 17, 18, 19, 20, 22

Hamilton-Brown Shoe Co. v. Wolf Bros. Co., 240 U.S. 251 (1916) 15

Page

O'Lone v. Estate of Shabazz,
107 S. Ct. 2400 (1987) 21

Rhodes v. Chapman,
542 U.S. 337 (1981) 27

Turner v. Safley,
107 S. Ct. 2254 (1987) 21, 26

Watson v. Fort Worth Bank and Trust,
108 S. Ct. 2777 (1988), Justice
Stevens concurring. 16, 23, 24

Western Air Lines v. Criswell,
105 S. Ct. 2743 (1985)
..... 17, 20, 21, 25

OPINIONS BELOW

Respondents rely upon the full text of the opinions from the lower courts which are set for the appendix to the initial petition.

JURISDICTION

Respondents accept the jurisdictional statement set forth in the initial petition.

STATUTES INVOLVED

Respondents rely upon the text of the statute set forth in the initial petition.

STATEMENT OF THE CASE

A. Facts and background.

The following facts are relevant to this objection. Citation is to the appendix of the initial petition (Initial Petition, A. __a) or to the trial record.

The Superintendent of TCI when the BFOQ plan at issue was approved by the Department of Health and Social Services was Nona Switala. Taycheedah Correctional Institute ("TCI") is Wisconsin's only maximum security prison

for women (Initial Petition A. 1a). At the time the BFOQ plan at issue was formulated a high percentage of the female inmates, approximately 60%, had histories of physical and sexual abuse by males (initial petition, A. 2a). Ms. Switala became the superintendent in 1978 (Tr. 9 at 4). Her professional experience before she was appointed superintendent was all in the corrections field. (Id.) She served as a probation and parole officer for eight years before assuming the responsibilities as the treatment director for TCI. (Id.) As treatment director for TCI, she had continual direct contact with the female inmates incarcerated in the prison (Tr. 9 at 11-22). Her job was to develop and manage the treatment programs that were necessary to satisfy Wisconsin's rehabilitation goals. (Id.) After three

years as TCI's treatment director, Switala assumed administrative duties with regards to all aspects of Wisconsin's penal policy as the newly appointed superintendent (Tr. 9 at 21, 22).

When the DHSS requested institution submissions for BFOQ plans, Switala, working with acting superintendent Robert Rafferty submitted a plan that requested authorization for a female sex BFOQ for at least one officer assigned to each living unit (Tr. 9 at 33-39). The duties of the officer in charge of a living unit included random and routine observation of all areas inhabited by inmates, whether occupied or unoccupied (Tr. 9

at 150, Exs. 350-59).[1] The perimeters of a living unit varied with the security level of the house function from a floor to an entire house (Tr. 9 at 33-152). This BFOQ was implemented to ensure that all of the most intrusive security procedures would be consistently and efficiently performed without unduly diminishing the female inmates' sense of dignity and integrity (Tr. 9 at 41-45). The female inmates would know that while in the intimate setting of their bedrooms and bathrooms and hallways of housing units a female officer with responsibility for observing them, wherever they

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[1]The trial testimony of the petitioners and their witnesses established that the petitioners disregarded their duty to observe in favor of preserving the inmates' privacy. Since the petitioners were housing unit sergeants, they were the highest ranking officers in the house and were the lead workers in authority over lower ranking officers (Tr. 9 at 50).

were, was always on duty and, therefore, security was not lax, and that while male officers could hold posts in the housing units,[2] they were not subjected to the exclusive power of a male in this personal intimate setting. (Id.) The BFOQ was meant to enhance both the actual security and the inmates' perception of security. (Id.) Switala's experience as the treatment director convinced her that it was reasonably necessary for an inmate to feel secure in order for the inmate to respond to the institution's treatment programs. (Id.)

Switala did not seek to create an unnatural environment, i.e., a prison from which men in authority were excluded

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[2]A male CO could be a "rover," an officer who moved through the house and on the ground, but who did not have the same duties in the house as the floor officer or Sergeant.

(Id., Tr. 10 at 5, 6). She did seek to create a residential environment in which the dual goals of security and rehabilitation were promoted through a limited BFOQ. (Id.)

Experts with substantial correctional experience testified that the BFOQ was reasonably necessary to promote the rehabilitation goals of this institution. In addition to superintendent Switala, the respondents presented testimony from Ms. Jacqueline Fleming, the current warden of Shakopee Correctional Institute, a female prison

in Minnesota[3] (Tr. 11 at 74-88). Ms. Fleming's testimony, based on her professional experience in the mental health field, her extensive experience as a correctional administrator and her substantial familiarity with TCI, was that the type of BFOQ at issue was necessary to promote rehabilitation in an institution where a large percent of the women inmates experienced physical and

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3The TCI BFOQ was not a blanket BFOQ that could inhibit the petitioners' movement up the ranks. The majority of the higher ranking officers at TCI were and continued to be male. Promotional opportunities existed for the petitioners. Between their demotion and the trial, each of the three petitioners had been offered three opportunities to regain their former rank as sergeant, two at TCI and a third at a nearby institution. The petitioners declined these opportunities and retained the CO II rank. (Torres, Vol. 1 at 206,211; Schmit, Vol. 2 at 100, 104,105; Utz, Vol 2 at 230, 234-35, 237). Further, throughout Wisconsin's correctional institutions, males held approximately 96% of the sergeant positions (Ex. 83).

sexual abuse (Tr. 11 at 82-86). Ms. JoAnne Brown, a lawyer and correctional consultant as well as the former superintendent of both male and female prisons in New Mexico also offered expert testimony in support of the BFOQ (Tr. J. Browne at 3-13, 30-34, 53, 54). In addition Ms. Brown testified to the different correctional concerns that occurred when an administrator was charged with rehabilitation responsibilities when the majority of the prison population had been abused or exploited by members of the opposite sex (Tr. J. Browne at 35, 45). In addition, Dr. Henry Musk, a psychologist who, for 10 years treated women prisoners with similarly abusive background testified as to the reasonable necessity of the BFOQ in light of the fundamental treatment needs of women who were victims of abuse

(Tr. at 29-48). The recidivism rates had not changed in the short time since the BFOQ plan was effective and the respondents did not offer any empirical proof, such as, validation studies.

The petitioners offered testimony from Dr. Frederick Fosdal, a psychiatrist who had never held either a treatment or administrative position in any prison, much less a female prison, who opined that while it was desirable to replicate normal situations by having males in the prison, it was not normative in our society for unrelated males to watch women sleep and that the atmosphere in the living unit would be improved, from the women inmate's perspective, if women correctional officers handled the routine monitoring in the living units (Tr. 6 at 14, 15, 31-33, Ex. 466). The petitioners also offered testimony from

Dr. Kalinich, a professor who was similarly lacking any professional employment in a women's prison and who had just recently taken an interest in women prisoners, who testified that the current "vogue" was to give up on rehabilitation (Tr. 6 at 140-43, 155). Kalinich also testified that there has been no research on the issue of the use of male guards in female prisons and very little on the subject of female correctional institutions in general (Tr. 6 at 138-43).

1. District court decision and order.

The district court decision found that approximately 60% of the inmates at Taycheedah Correctional Institution had been sexually or physically abused (Initial Petition, A. 88a). The court held that the expert testimony given by

the prison's administrator and that given by other penalogical experts that the BFOQ was reasonably necessary to the rehabilitation of these inmate could not validate the plan. The court did not evaluate or otherwise consider this evidence except to note that petitioners presented conflicting evidence. (Id.) The court refused to find the plan valid in the absence of objective evidence from "empirical studies or otherwise displaying the validity of the theory" (Initial Petition, 89A).

2. Court of appeals panel decision.

Respondents have nothing to add to petitioners statement of this decision.

3. Court of appeals on en banc decision.

The en banc opinion reversed the district court opinion with regard to nature of the proof necessary to establish the validity of the BFOQ plan. The court held that respondents were not required to introduce validation studies or similar empirical evidence in order to meet their burden of proof (Initial Petition, 21A). The en banc opinion allows that respondents could prove a reasonable necessity through expert testimony and evidence other than validation studies or statistics. (Id.) The en banc opinion held that standard imposed by Judge Warren was unfair because it was, essentially, impossible--the record established that the scholarly work on the rehabilitation of female offenders has yet to be commenced. The court also observed that

the district court ought not require unanimity of opinion or substitute completely its own judgment for that of the administration in its reconsideration of the case.

The court did not establish any bright line rule governing the nature of the proof required to meet the reasonable necessity standard of Title VII with regard to a gender BFOQ. Rather, it remanded the case for further proceedings, including the presentation of additional evidence, with a direction that the court give the issue further consideration based "on the totality of the circumstances as contained in the entire record" (Initial Petition, A. 21a). The court declared that the decisions of penal administrators are not to be given the same degree of deference in Title VII cases as they are given in

constitutional cases, but nonetheless they are entitled to substantial weight when they are the product of reasoned decision making based on available information and experience. Additionally, the court held that the employment situation in which an employer could argue that gender based distinctions were a "reasonably necessary" approach to innovation in one's business were "rare" indeed (Initial Petition, A. 22a, A. 23a).

REASONS FOR DENYING THE WRIT

I. THE CASE IS NOT RIPE FOR REVIEW.

The questions presented section of the petition and, in general, the entire brief creates the impression that the merits of the BFOQ issue were decided by the court of appeals and that the petitioners are appealing from a final

judgment. This is an erroneous impression. The court of appeals did reverse the district court, but only on the narrow issue of the nature of proof capable of sustaining a BFOQ plan in a Title VII case.[4] Respondents submit that the writ should be denied until a final judgment is entered.

Certiorari jurisdiction is "to be exercised sparingly" and "except in extraordinary cases, the writ is not issued until final decree." Hamilton-Brown Shoe Co. v. Wolf Bros. Co., 240 U.S. 251, 258 (1916). The usual reasons for not granting the writ at this time apply. First, given the factual bound nature of any final decision, the trial record should be as complete as possible before this court expends judicial

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[4]The final section of petitioners' brief recognizes this fact.

resources on a review of the case or of the evidentiary standards governing the case. See, Watson v. Fort Worth Bank and Trust, 108 S. Ct. 2777, 279 (1988), Justice Stevens concurring. In addition, the petitioners may prevail in the district court, eliminating any interest on their part and review by the supreme court. Whether or not the petitioners prevail on the merits of this issue, by denying the writ at this time, the supreme court would ensure that it had the benefit of a lower court opinion addressing the totality of the evidence in the record and evaluating and weighing that evidence instead of decisions that disagree on the narrow issue of whether a gender BFOQ can ever be justified without validation studies or similar statistical evidence.

II. THE WRIT SHOULD BE DENIED BECAUSE THE EN BANC DECISION IS CONSISTENT WITH THE DECISIONS OF THE SUPREME COURT AND THOSE OF THE CIRCUITS.

The petitioners' assertion that the en banc decision is in conflict with Dothard v. Rawlinson, 97 S. Ct. 2720 (1977), Western Air Lines v. Criswell, 105 S. Ct. 2743 (1985) and other supreme court cases is the direct result of its overbroad characterization of the decision and its failure to read these decisions closely. Petitioners' claim that the decision opens "a pandora's box" regarding deference which has no logical stopping point is similarly erroneous (Initial Petition, at 15-16). A comparison of the actual language of the decision with that of the relevant cases will quickly establish how exaggerated and inappropriately alarmist the petitioners' "pandora's box" cry is.

The en banc decision did not recognize any general principle of broad deference to employer's judgment, even when the employer is a prison administrator who would be afforded such deference in constitutional cases.[5] What the court in fact did was duplicate the analysis employed by the supreme court in Dothard. In "conformity with the mandate of the supreme court in Dothard," the court first identified the particular and unique environment that was under consideration which it found to be maximum security womens prison in which the respondents were engaged in carrying out the legislatively mandated "business" of rehabilitating the women prisoners

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[5]The decision states flatly: "In the Title VII context, the decision of penal administrators need not be given as much deference as accorded their decisions in constitutional cases" (Initial Petition, A. 21A).

(Initial Petition, A. 14a, 15a). Like the Dothard court, the en banc decision then focused on the key characteristic of the inmate population. In Dothard that was the 20% sex offender group; in this case, the 60% sexually and physically abused group were the central concern.

The court then answered the question of whether or not Dothard required that penal administrators' have objective evidence, in the form of validation studies or empirical proof, to justify a BFOQ. The court found that not only had such studies not been required in Dothard, but that moreover, the supreme court's finding that "there is a basis in fact for expecting that sex offenders who have criminally assaulted women in the past would be moved to do so again if access to women were established within the prison" and that there would be a

real "risk that other inmates, deprived of a normal heterosexual environment, would assault women guards because they were women" were a product of a common sense understanding of penalogical conditions and, implicitly, a limited degree of judicial deference to prison administrator's judgment (Initial Petition, A. 19a). It applied similar reasoning to the case before it. The en banc decision does not conflict with Dothard; to the contrary it follows in its footsteps.

The en banc ruling that empirical studies are not always necessary to validate a BFOQ and that deference may play a limited role in certain special circumstances is similarly supported by the Criswell decision. In Criswell, the supreme court recognized the fallacy of requiring empirical studies when it held

that the airline need not establish the risk of an airline accident to a certainty "for certainty would require running the risk until a tragic accident would prove the judgment was sound." Further, the court considered it permissible for the fact finder to defer to the airline's judgment in close cases. Criswell, 105 S. Ct. at 2754 (Initial Petition, A. 19a, n.3).[6]

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[6]The en banc decision appropriately incorporates those precepts that the supreme court has found to be relevant to the review of penal administrators judgments, i.e., recognition of the complex and intractable problems faced by prison administrators and the need to "anticipate" and "innovate," Turner v. Safley, 107 S. Ct. 2254 (1987), O'Lone v. Estate of Shabazz, 107 S. Ct. 2400 (1987) in its determination that a prison administrator can validate a BFOQ without empirical studies or the like. However, the opinion does not hold that these principles require broad deference to penal administrators. Rather, the court finds that these features make it unfair and unreasonable to require the kind of objective proof that might fairly be demanded in other cases.

While the district court is directed to accord the judgment of the penal administrator's substantial weight, it need do so only to the extent that the judgment constitutes a reasoned belief based on available information and evidence. This formulation, quite like the ordinary instruction on expert testimony, derives more from common sense than from any federal deference policy. It does not permit stereotyping (a prejudice without a reasoned basis in fact or experience). The en banc decision follows the law established in Dothard and other Title VII cases.

III. THE EN BANC DECISION DOES NOT PERMIT SEX DISCRIMINATION WITHOUT AN ADEQUATE BASIS.

The third section of the petitioners' argument again sounds the

floodgate alarm.[7] Petitioners argue that unless objective, empirical or statistical evidence is required, employers will be able to discriminate on the basis of sex with impunity. The petitioners' reliance on Watson v. Fort Worth Bank and Trust, 108 S. Ct. 2777 (1988) for this proposition is mystifying. In Watson the court held that, once plaintiff had established a prima facie case of discrimination, the bank could successfully establish "business necessity" on the basis of subjective judgments without validation studies or similar statistical evidence. The court explicitly recognized that validation studies or

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[7]Respondents are not responding independently to petitioners second argument as it is repetitive of petitioners first argument.

standardized testing is not always practicable, as for example, when identification of personal qualities such as common sense, good judgment, originality or ambition were the objective. Watson, 108 S. Ct. 2777, 2780, 2787, 2791 (1988).[8]

The en banc decision is consistent with Watson and the decision in Chambers v. Omaha Girls Club Inc., 834 F.2d 697 (8th Cir. 1987), in which the eighth circuit held that the employer established a valid role BFOQ without the

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[8]The en banc decision recognized that "rehabilitation" encompassed concepts more refined than the gross measure of recidivism.

benefit of objective statistical evidence.[9]

The respondents have not been relieved of their heavy burden in this case. They simply have been relieved of the impossible burden imposed by the district court. They must still persuade the district court, a court which is charged with reviewing the totality of the evidence that the BFOQ plan at issue is valid.

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[9]The principle unifying these cases is a healthy dose of realism. These courts have refused to impress upon the an employer the impossible or highly impracticable burden of introducing evidence that either does not exist or cannot be reliably produced because of testing difficulties. See also, Criswell, 105 S. Ct. at 2748.

IV. REHABILITATION CAN SERVE AS THE BASIS FOR A BFOQ.

Title VII permits employers to establish those bona fide occupational qualifications reasonably necessary to the normal operations of the business or enterprise. Federal courts do not have any general authority to determine that the State of Wisconsin may not engage in the business of rehabilitation. Well established principles of commodity oppose such action. Turner v. Safley, 107 S. Ct. 2254 (1987).

The warden of Taycheedah Correctional Institution has a legislatively mandated responsibility to rehabilitate the women incarcerated in Taycheedah (Initial Petition, Appendix A. 15a). No less authority than the supreme court has observed that penal administrators must deal with "perplexing sociological

problems in order to achieve the goals of the penal function in the criminal justice system: to punish justly, to deter future crime, and to return imprisoned persons to society with an improved chance of being useful law abiding citizens." Rhodes v. Chapman, 452 U.S. 337, 352 (1981) (Initial Petition, Appendix 14A).

The State of Wisconsin has made a public policy decision that it will engage in the business of rehabilitation. That being so, it may establish a valid BFOQ under Title VII when such is reasonably necessary to the normal operations of that enterprise.

CONCLUSION

For all the reasons stated above the court should deny the writ.

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